Supreme Court, U.S.
FILED

961233 FEB 4 1997

OFFICE OF THE CLERK

No. 96-___

In The

Supreme Court of the United States

October Term, 1996

THORN Americas, Inc., (formerly known as Rent-A-Center, Inc.), a Delaware corporation, and THORN EMI North America Holdings, Inc., a Delaware corporation,

Petitioners,

vs.

Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANICE M. SYMCHYCH
Counsel Of Record
STEVEN J. WELLS
PETER W. CARTER
DORSEY & WHITNEY LLP
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-2600

SHANNON L. SPANGLER
SHOOK, HARDY & BACON L.L.P.
1200 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-6550

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 PP

QUESTIONS PRESENTED

1. Does the imposition of civil liability in a class action, with severe penal consequences for already completed transactions, when those transactions are only regarded as unlawful because of a radical and unexpected change in state law articulated for the first time in the case at hand, violate the Due Process Clause, as *Bouie v. City of Columbia*, 378 U.S. 347 (1964), holds that it does with regard to criminal penalties?

2. In light of this Court's application of Due Process principles to civil punitive damages in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), did the court of appeals err in applying a "more tolerant" vagueness test on the ground that the punitive aspects of the state usury statute impose only civil penalties, and thus err in failing to hold that a radical and unexpected construction of a statute renders the statute as it existed prior to that interpretation unconstitutionally vague?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the appeal in the United States Court of Appeals for the Eighth Circuit, whose judgment petitioners request be reviewed, included petitioners THORN Americas, Inc., and THORN EMI North America Holdings, Inc., and respondents Vickie Fogie, Joan Leonard, and Angela Adams.

Until August 1996, THORN Americas, Inc. was an indirect, wholly owned subsidiary of THORN EMI North America Holdings, Inc. THORN Americas, Inc. was a direct, wholly owned subsidiary of TEUSA Holdings, Inc. THORN North America Holdings, Inc. was also the direct parent company of THORN EMI (USA), Inc. After August 1996, THORN EMI International BV, a Dutch holding company, became the parent company of THORN Americas, Inc. THORN Americas, Inc. is the direct parent of Advantage Companies, Inc., RAC USA, Inc., THORN Rental Trading, Inc., a Delaware company, and is an indirect parent of Remco America, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Facts Material To This Court's Consideration Of The Questions Presented	4
B. Minnesota Law At The Time The Rent-To-Own Transactions Were Entered Into	5
C. The Unforeseeable Change In The Law	9
D. The Decisions Below	11
REASONS FOR GRANTING THE WRIT	14
I. THE RULE ARTICULATED IN *BOUIE* SHOULD BE APPLIED TO THE RADICAL AND UNFORESEEABLE EXPANSION OF A CIVIL STATUTE, PENAL IN NATURE	15
II. THIS COURT SHOULD DECIDE WHETHER A VAGUENESS CHALLENGE TO A STATUTE INVOLVING SEVERE CIVIL PENALTIES REQUIRES SOMETHING MORE THAN A MERELY "TOLERANT" REVIEW	22
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) ..... *passim*

Bouie v. City of Columbia, 378 U.S. 347 (1964) .... *passim*

Citizen's Nat'l Bank v. Taylor, 368 N.W.2d 913 (Minn. 1985) 6

Diebold, Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978) 26

Fogie v. Rent-A-Center, Inc., 518 N.W.2d 544 (Minn. 1994) ..... *passim*

Fogie v. Rent-A-Center, Inc., 867 F. Supp. 1398 (D. Minn. 1993) 1

Fogie v. THORN Americas, Inc., 95 F.3d 645 (8th Cir. 1996) ..... *passim*

Gates & Fox Co. v. OSHRC, 790 F.2d 154 (D.C. Cir. 1986) 26

General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) 26

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) ..23, 24

Grayned v. City of Rockford, 408 U.S. 104 (1972) ...23, 25

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 15

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 14

Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119 (7th Cir. 1981) 26

Linne v. Ronkainen, 37 N.W.2d 237 (Minn. 1949) 6

TABLE OF AUTHORITIES – Continued

Page

Marks v. United States, 430 U.S. 188 (1977).....14, 16

Miller v. Colortyme, Inc., 504 N.W.2d 258 (Minn. Ct. App. 1993).....9, 10, 19

Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994).....3, 7, 8, 11, 12

Mohr v. Minnesota Elevator Co., 41 N.W. 1074 (Minn. 1889).....8

Munson v. Orrin E. Thompson Homes, Inc., 395 F. Supp. 152 (D. Minn. 1974).....8

Rathbun v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1974).....6

Schauman v. Solmica Midwest, Inc., 168 N.W.2d 667 (Minn. 1969).....6

United Realty Trust v. Property Development & Research Co., 269 N.W.2d 737 (Minn. 1978).....6, 17

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).....17, 24, 25

Walter E. Heller & Co. v. Warner, 163 N.W.2d 573 (Minn. 1968).....6

UNITED STATES CONSTITUTION:

Due Process Clauses, U.S. Const. amend. V, XIV 2

Ex Post Facto Clauses, U.S. Const. art. I, §§ 9, 10 14

UNITED STATES STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331, 1367 5

TABLE OF AUTHORITIES – Continued

Page

MINNESOTA STATUTES:

Minn. Stat. §§ 325F.84-.98 ..... 2, 3
Minn. Stat. § 325F.85 ..... 2, 3, 7, 19, 24
Minn. Stat. § 325F.86 ..... 2, 3, 7, 19
Minn. Stat. §§ 325F.87-.88 ..... 7, 9, 19
Minn. Stat. §§ 325F.89-.90 ..... 3, 7
Minn. Stat. § 325G.15 ..... 2, 7, 8, 9
Minn. Stat. § 325G.16 ..... 2, 11
Minn. Stat. §§ 334.01-.05 ..... 2, 6
Minn. Stat. § 334.01 ..... 2, 6, 9
Minn. Stat. § 334.03 ..... 2, 6, 12, 18, 24

OTHER:

Hearings on S.1499 Before the Senate Commerce Comm., Tape 1 at 3 (March 1, 1990) (statement of Senator Dahl, author of bill) 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners THORN Americas, Inc. ("THORN Americas") and THORN EMI North America Holdings, Inc. respectfully petition that a Writ of Certiorari issue to review the September 6, 1996 decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' decision (App. A), dated September 6, 1996, is reported at 95 F.3d 645 (8th Cir. 1996). The district court's September 28, 1995 Memorandum and Order (App. B) is not reported. A related opinion of the Minnesota Supreme Court (App. D) that answered two certified questions from the district court is reported at *Fogie v. Rent-A-Center, Inc.*, 518 N.W.2d 544 (Minn. 1994). The district court opinion certifying the class is reported at *Fogie v. Rent-A-Center, Inc.*, 867 F. Supp. 1398 (D. Minn. 1993).

JURISDICTION

The court of appeals' decision of which review is sought was rendered in an opinion filed on September 6, 1996 (App. A). The court of appeals denied a timely petition for rehearing on November 6, 1996 (App. C). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Section I of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The Minnesota Rental-Purchase Agreement Act, Minn. Stat. §§ 325F.84-.98, is reproduced in full in Appendix E.

The pertinent Minnesota usury statutes, Minn. Stat. §§ 334.01-.05, are reproduced in Appendix F.

The Minnesota Consumer Credit Sales Act, Minn. Stat. §§ 325G.15-.16, is reproduced in full in Appendix G.

STATEMENT OF THE CASE

It is deeply embedded in our Constitution that neither a legislature nor a court can retroactively impose criminal punishment. The imposition of civil liability without sufficient notice raises the same constitutional concerns when such liability gives rise to egregious penalties that equate to a quasi-criminal sanction. Due process requires fair notice of all penal judgments, whether due to criminal or civil liability, before they are imposed. This case presents the important issue of whether a judicial retroactive application of a radical and unexpected

change in the law, that deems thousands of completed transactions unlawful (resulting in civil penalties respondents estimate in the tens of millions of dollars) also violates due process principles.

The law of usury had remained unchanged in Minnesota for 100 years. In reliance on that well-established precedent, THORN Americas built its rental-purchase business and, through its Rent-A-Center stores, entered into rental-purchase agreements with thousands of customers. Each of those agreements fully complied with the Rental-Purchase Agreement Act ("Rental-Purchase Act") – a comprehensive state statute regulating rental-purchase transactions. Minn. Stat. §§ 325F.84-.98 (App. E). Responding to certified questions put to it by the district court in this case, the Minnesota Supreme Court dramatically altered the law and declared for the first time that rental-purchase agreements were credit sales. The state court also held that two of the four essential elements of usury would be eliminated for rental-purchase transactions, thus subjecting rental-purchase transactions to severe penalties that voided the already completed transactions *ab initio*. *Fogie v. Rent-A-Center, Inc.*, 518 N.W.2d 544 (Minn. 1994) (App. 44-45) and *Miller v. Colortyme*, 518 N.W.2d 544 (Minn. 1994) (App. 45-62) ("*Colortyme/Fogie*"). Despite the unforeseeable nature of the state court's profound alteration of the law, the court of appeals affirmed the district court's retroactive application of this expansion of the usury statute to thousands of already completed rental-purchase transactions. The retroactive application of this radical change in the law, and the accompanying severe, and totally unexpected, civil penalties, violated THORN Americas' due process rights.

A. The Facts Material To This Court's Consideration Of The Questions Presented

THORN Americas owns rental-purchase stores across the country that operate under the trade name Rent-A-Center. Eight of its approximately 1,400 stores are located in the State of Minnesota. C.A. App. at 63.[1] These stores offer quality, name-brand household goods such as furniture, appliances, televisions and camcorders for rent through rental-purchase agreements. A rental-purchase agreement is an agreement that may be renewed by the customer after its initial term; it also allows, but does not require, the customer to purchase the property. C.A. App. at 40-51, 63-66.

The initial term of each rental-purchase agreement is either a month or a week, and rent for that term is paid in advance. *Id.* Nothing is paid beyond the initial payment for that rental term, and no commitment is made to make future payments. *Id.* At the end of each week or month the customer has the option to renew the agreement for an additional term. *Id.* A customer does not undergo a credit check, does not pledge any collateral, does not need to leave a deposit, and has no future obligation beyond the initial one week or one month term. C.A. App. at 63-66. This makes goods available to persons who find the flexibility of the transaction appealing or who are otherwise unable to pay full price or obtain credit. Under the law as it existed prior to the Minnesota Supreme Court's answer to the questions certified by the district

---

[1] C.A. App. refers to the appendix submitted to the court of appeals with appellants' (now petitioners) brief.

court, no loan was made to the customer, no credit obligation was created, and certainly no loan agreement was intended. *See* App. E, F, G.

A customer who so chooses can purchase items available in Rent-A-Center stores in three different ways. First, a customer can simply purchase the item for cash, in which case no rental-purchase agreement is entered into at all. C.A. App. at 63-66. Second, if a customer does enter a rental-purchase agreement, he or she may purchase the item by renewing the agreement a specified number of times, as determined by and disclosed in the agreement. *Id.* Third, under an early purchase option, a customer can pay 55% of the remaining renewal payments otherwise necessary to acquire ownership. *Id.* At no time, however, are customers ever required to renew their agreements or to purchase the property. C.A. App. at 40-51, 63-66. In fact, fewer than 30% of agreements result in purchase of the property by the renter. C.A. App. at 78.

B. Minnesota Law At The Time The Rent-To-Own Transactions Were Entered Into

This class action was brought by respondents on behalf of all persons in Minnesota who entered into rental-purchase agreements since August 1, 1990.[2] Prior to the initiation of this action, no Minnesota court had ever applied the usury statute to rental-purchase agreements. The essential elements of Minnesota usury law

---

[2] The federal district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367.

had remained unchanged for over 100 years. Minn. Stat. §§ 334.01-.05 at App. 80-83. Minnesota courts had consistently held that the usury statute required a party to prove each of the following four elements: 1) a loan of money or forbearance of debt; 2) an agreement that the principal shall be repayable absolutely; 3) the exaction of a greater amount of interest than allowed by law; and 4) the presence of an intent to evade the law at the inception of the transaction. *Citizen's Nat'l Bank v. Taylor*, 368 N.W.2d 913, 918 (Minn. 1985); *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974).

A long line of Minnesota cases has held that the usury statute is strictly construed due to its penal nature. *United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 743 (Minn. 1978); *Walter E. Heller & Co. v. Warner*, 163 N.W.2d 573, 577-78 (Minn. 1968). Consistent with this requirement, transactions that did not meet each of the four usury elements were not usurious. *See, e.g., Schauman v. Solmica Midwest, Inc.*, 168 N.W.2d 667, 672-73 (Minn. 1969); *Walter E. Heller & Co.*, 163 N.W.2d at 578; *Linne v. Ronkainen*, 37 N.W.2d 237, 239-40 (Minn. 1949). Furthermore, the usury law itself specifically provided that its remedies did not apply to "such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute." Minn. Stat. § 334.03 at App. 82.

On August 1, 1990, the Rental-Purchase Act, a comprehensive series of statutes regulating the Minnesota rental-purchase industry, went into effect. August 1, 1990, is also the starting date of the class certified by the district court. The legislative history of that act described it as the "strongest consumer protection that is available

anywhere in the nation to people who buy through the rent-to-own process and . . . will end up being used as a model for other states." Senate Commerce Committee Hearing, 3/1/90, Tape 1 at 3. The Rental-Purchase Act governs virtually every aspect of rental-purchase agreements. It has stringent, wide-ranging disclosure requirements, compelling a lessor to disclose a laundry list of information, including: 1) the total payments necessary to obtain ownership; 2) the difference between the amount necessary to purchase the merchandise through the agreement renewal method and the cash price; 3) any charges in addition to the rental rate; and 4) various consumer rights under state law. Minn. Stat. § 325F.86 at App. 64-66. The Rental-Purchase Act mandates the type size of the rental-purchase agreement, determines when the disclosures must be made, and regulates the advertising of rental-purchase agreements. *See* Minn. Stat. §§ 325F.87-.88 at App. 67-69. The Rental-Purchase Act also defines what constitutes default of the agreement, states the customer's reinstatement rights upon default, and prescribes what charges are appropriate as reinstatement and redelivery fees. Minn. Stat. §§ 325F.89-.90 at App. 69-72. Most importantly, § 325F.85 of the Rental-Purchase Act expressly provides that if the Act conflicts with the Consumer Credit Sales Act, the Rental-Purchase Act governs. THORN Americas fully complied with the Rental-Purchase Act. App. E.

Until the *Colortyme/Fogie* decision in this case, the Consumer Credit Sales Act ("Credit Sales Act") only regulated agreements that involved the lessor granting credit to a customer. Minn. Stat. § 325G.15, subd. 2(a) at App.

84. Enacted in 1971, the Credit Sales Act imposed relatively minor restrictions on consumer credit retail transactions. In 1981, the Credit Sales Act was amended to include certain terminable leases in its definition of the term "sale of goods," but only where credit is provided. Minn. Stat. § 325G.15, subd. 5 at App. 85. Under the Credit Sales Act, a "consumer credit sale" is defined as: "a sale of goods or services in which (a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind." Minn. Stat. § 325G.15, subd. 2(a). At App. 84. Under age-old Minnesota law, credit is not extended unless there exists an underlying debt and an obligation to make full and complete payment. *Mohr v. Minnesota Elevator Co.*, 41 N.W. 1074, 1076 (Minn. 1889); *accord Munson v. Orrin E. Thompson Homes, Inc.*, 395 F. Supp. 152, 157 (D. Minn. 1974). The Credit Sales Act does not incorporate or even make reference to the usury statute. Nor does the text of the Credit Sales Act suggest that the Legislature meant to alter, amend, or affect the usury statute in any way.

Thus, prior to the *Colortyme/Fogie* ruling in this case, because of the absence of a granting of credit, the Credit Sales Act on its face simply did not apply to Rent-A-Center's rental-purchase agreements. The Rent-A-Center rental-purchase agreements gave customers the unconditional option to walk away from the transaction, without charge, after the end of the initial one week or one month term, or indeed after any individual renewal of the agreement. In reliance on the well-established elements of Minnesota usury law and the then newly-enacted comprehensive Rental-Purchase Act, THORN Americas organized its business practices precisely to comply with state law and avoid any question of whether credit was being

extended. Through its Rent-A-Center stores, THORN Americas entered into thousands of rental-purchase agreements in the State of Minnesota. The Rent-A-Center agreements fully complied with the extensive requirements of the Rental-Purchase Act. The agreements made all the required disclosures. *See* Minn. Stat. § 325F.88, subd. 2(a) at App. 68. Not only did the agreements fully comply with the Rental-Purchase Act, but they disclosed to customers, as a central term, the key distinguishing feature between a rental-purchase agreement and a consumer credit sale – namely, that the customer had absolutely no obligation to renew the agreement after the initial week or month. Thus no "credit was granted" because absent an obligation to renew no debt existed.

C. The Unforeseeable Change In The Law

In *Miller v. Colortyme, Inc.*, 504 N.W.2d 258 (Minn. Ct. App. 1993), a panel of the Minnesota Court of Appeals unanimously held that rental-purchase agreements were not subject to the Credit Sales Act and the usury statutes. In 1994 the Minnesota Supreme Court granted review. Apparently because the same issue was dispositive in this case, the district court granted respondents' motion to certify the following two questions to the Minnesota Supreme Court: 1) Are rent-to-own contracts consumer credit sales under Minn. Stat. § 325G.15? 2) Does the usury statute, Minn. Stat. § 334.01, apply to rent-to-own contracts?

On June 24, 1995, the Minnesota Supreme Court both answered the questions certified to it in this case in the affirmative and reversed the *Colortyme* decision of the

Minnesota Court of Appeals. It affirmatively answered the certified questions for the reasons explained in its simultaneously issued decision in *Colortyme*. 518 N.W.2d at 544 at App. 44-45.

In its opinion, the Minnesota Supreme Court drastically expanded the Credit Sales Act and the penal usury statute to apply to transactions they had never before reached, and completely discounted the fact that rental-purchase agreements fully complied with the Rental-Purchase Act – all in a manner totally unforeseeable to THORN Americas and to any party engaging in the rent-to-own business. The plaintiffs in *Colortyme* alleged that the rental-purchase agreements they entered into were subject to the Credit Sales Act and the usury statute. 518 N.W.2d at 547 at App. 49-51. The court acknowledged that at common law a rental-purchase agreement was not a sale because "a buyer is not bound to pay the total purchase price." *Id.* The court correctly observed that certain terminable leases were considered a "sale of goods" under the Credit Sales Act. The court, however, rendered meaningless the essential Credit Sales Act requirement that the sale of goods be one "in which credit is granted," by simply declaring that "sales are ordinarily regarded as 'credit sales' where a buyer acquires possession but is allowed to defer full payment." *Id.* at 548 at App. 53. With this observation, the court transformed rental-purchase agreements that did not involve the granting of credit into the legal equivalent of debt transactions, and, in effect, judicially repealed a comprehensive set of statutes enacted in 1990 that regulated the rental-purchase industry.

The Minnesota Supreme Court then created a previously nonexistent bridge between the Credit Sales Act and the Minnesota usury statute by inserting language into a provision of the Credit Sales Act. The court read the term "credit" into the text of Minn. Stat. § 325G.16, subd. 4. *See* 518 N.W.2d at 548 at App. 53. According to the court, the Credit Sales Act, as newly construed, now "defined" each and every rental-purchase agreement as a "consumer *credit sale* for all purposes," even though the language of this provision actually reads "shall be deemed a *sale* for all purposes." Minn. Stat. § 325G.16, subd. 4 at App. 87. What the legislature had defined as a "sale for all purposes" was thus redefined by the court to mean a "credit sale for all purposes."

As a result, according to the court, despite the absence of a loan or interest, the first two essential elements of usury – a loan of money or forbearance of debt and an agreement that the principal shall be repaid – were now met "by operation of statute." *Id.* at 549 at App. 56. Thus, after *Colortyme*, the same rental-purchase agreements that had fully complied with the Rental-Purchase Act and that renters could terminate at any time were suddenly redefined as credit transactions subject to penal usury remedies.

D. The Decisions Below

Because no factual record had been provided to the Minnesota Supreme Court with the certified questions, the profound change in the Minnesota consumer protection statutes articulated in *Colortyme/Fogie* was applied in this case for the first time by the district court in its decision filed September 28, 1995. With no analysis, the

district court summarily concluded that, in light of *Colortyme/Fogie*, the rental-purchase agreements at issue here were consumer credit sales. Applying the unforeseeable change in the law articulated in *Colortyme/Fogie*, the district court accepted the Minnesota Supreme Court's judicial gloss of the Credit Sales Act that changed "sales for all purposes" to "credit sales for all purposes." THORN Americas' full compliance with the Rental-Purchase Act was summarily rejected as a defense even though the usury statute expressly provides to the contrary. Minn. Stat. § 334.03 at App. 82-83.

Without regard to the well-recognized penal nature of the usury law and the unforeseeable nature of the radical change in the law, the district court rejected THORN Americas' constitutional due process challenges to the retroactive application of the new rule to the thousands of completed events at issue here, by applying the less strict vagueness test and by deciding that the *Colortyme/Fogie* decision did not represent a change in the law. As a remedy for the violation of the penal usury statute, the court voided all of the thousands of rental-purchase agreements completed since 1990 and subjected THORN Americas to liability that respondents estimate at more than $30 million, in essence undoing all of the business that THORN Americas had engaged in from August 1990 forward.

The court of appeals affirmed. The court of appeals acknowledged the "punitive aspects" of the usury statute, but concluded that because the statute imposed only civil remedies "the broader, more tolerant test of vagueness is required here." 95 F.3d at 650 at App. 10. Applying this test, the court of appeals reiterated the Minnesota

Supreme Court's tortured analysis that rendered the credit requirement of the Credit Sales Act meaningless. Even though the Minnesota Supreme Court had created a never-before existing link between the Credit Sales Act and the usury statute that eliminated two of the essential elements of the previously strictly-construed usury statute, the court of appeals concluded that "[t]hese statutory provisions give sufficient notice to those engaged in the rent-to-own industry that their rental purchase contracts fall within the [Credit Sales Act] and are subject to usury laws." 95 F.3d at 650 at App. 11. The court of appeals did not address THORN Americas' full compliance with the Rental-Purchase Act.

The court of appeals rejected THORN Americas' argument that the retroactive application of the expanded penal usury statute operated like an ex post facto law in violation of THORN Americas' due process rights. Assuming that the usury statute was penal in nature, the court of appeals discussed the rule announced in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), but, despite the radical transformation of the law, concluded that *Bouie* did not apply here. The court of appeals reasoned:

> The [*Colortyme*] decision did not change the elements of a usury claim. It is a judicial interpretation of the statutory scheme that existed long before the present contracts were made. The judicial construction . . . is not "unexpected or indefensible by reference to" the statutory framework already in place. On the contrary, the judicial construction is reasonable and foreseeable . . . .

93 F.3d at 650 at App. 13. A timely petition for rehearing was denied. App. C.

REASONS FOR GRANTING THE WRIT

The retroactive application of an unforeseeable and radical interpretation of state law, changing century old precedent and imposing usury liability in the absence of a debt, violates fundamental concepts of due process. The Constitution disfavors the retroactive application of changes in the law, whether by legislatures or by courts. The constitutional hostility towards retroactive lawmaking increases as the punitive character of the law becomes more clear. For example, the Ex Post Facto Clauses, U.S. Const. art. I, §§ 9, 10, create a nearly absolute ban on retroactive penal legislation, and the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit retroactive judicial enlargement of obligations imposed by the criminal law. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Marks v. United States*, 430 U.S. 188 (1977). Consistent with the Constitution's abhorrence of retroactive application of unforeseeable changes in law, the Constitution also demands that notice be given of conduct that will subject one to punishment, whether it be civil or criminal. *BMW of North Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.22 (1996). Indeed, "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). The imposition of liability against THORN Americas violated all of these constitutional fundamentals.

The Court should grant the writ because this case presents the fundamental and important question, suggested in *Bouie*, of whether it violates the Due Process Clause for a court in a civil case to apply retroactively a completely unforeseeable change in law, in a manner that imposes a remedy penal in nature in the very case in which the change in law is announced.[3] This case also gives the Court the opportunity to clarify the appropriate standard for determining whether a civil statute with penal consequences is unconstitutionally vague. Review is warranted because the decision of the court of appeals conflicts with the basic constitutional principle that a party cannot be retroactively subjected to enormous and devastating penalties for engaging in conduct that no person could reasonably have known would result in any sanctions at all.

I. THE RULE ARTICULATED IN *BOUIE* SHOULD BE APPLIED TO THE RADICAL AND UNFORESEEABLE EXPANSION OF A CIVIL STATUTE, PENAL IN NATURE

Just this past term, the Court in *BMW v. Gore* held that due process mandates that parties be afforded fair notice prior to the imposition of substantial civil penalties because "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person

---

[3] This case thus does not involve the choice-of-law retroactivity at issue in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

receive fair notice not only of the conduct that will subject him to punishment but also of the severity of penalty." 116 S. Ct. at 1598. The deprivation of the right to fair notice guaranteed by the Constitution can "result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. In *Bouie*, this Court considered the unexpected broadening of a criminal statute that was "definite and precise" on its face. *Id.* The Court concluded that the unforeseeable expansion of such a statute by a court "operates precisely like an *ex post facto* law," and violates an individual's due process rights. *Id.* According to the Court:

> If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect.

Bouie, 378 U.S. at 354; *see also Marks v. United States*, 430 U.S. 188, 191-96 (1977).

The Court should apply *Bouie* to this case. Here the court applied retroactively an unexpected and unforeseeable change in state law, penal in nature, virtually eliminating an entire industry in the State of Minnesota. The September 28, 1995 decision of the district court voided thousands of rental-purchase agreements *ab initio*, enjoined THORN Americas from engaging in the rental-purchase business (a business specifically authorized and regulated by the Rental-Purchase Act), stripped THORN Americas of its ownership interests in the property that its customers had been renting, and subjected THORN

Americas to penal consequences estimated by respondents to be approximately $30 million. In light of these harsh consequences, the characterization by Minnesota courts that the usury statute is "penal in nature" is an understatement. *See United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 742 (Minn. 1978). If *Bouie* applies to any civil case, this case is the exemplar. Not only was the application of the change in the law completely unforeseeable, but THORN Americas had organized its business around a comprehensive set of statutes enacted to regulate the rent-to-own industry. This situation will stand as a clear exposition of when *Bouie* can apply outside the criminal context.[4]

The "unexpected and indefensible" nature of the change in the law in this case is even more compelling than the change in the law that the *Bouie* Court found so repugnant. In the legal framework that existed at the time, no reasonable person could have foreseen the Minnesota Supreme Court's tortured and result-driven interpretation of the Credit Sales Act and the usury statutes. Not surprisingly, in 1984, six years before enactment of the Rental-Purchase Act, counsel for Rent-A-Center's franchisee reviewed the law and specifically concluded that the Credit Sales Act did not apply to the rental-purchase agreements – a conclusion only bolstered by the

---

[4] Application of *Bouie* to the case at hand is not only compelled by the penal nature of the usury statute, it is consistent with this Court's due process review of other quasi-criminal statutes. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (assumption that quasi-criminal law warrants a relatively strict test); *cf. BMW of North Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.22 (1996).

later enactment of the Rental-Purchase Act.[5] THORN Americas had relied on well-established precedent that the usury statute, due to its penal nature, was strictly construed and that each of its four elements had to be met. THORN Americas could not have known that two of the essential elements would be suspended "by operation of" a totally unrelated statute. The usury statute also expressly provides that all usurious contracts are void *except* "such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute. . . . " Minn. Stat. § 334.03 at App. 82. This clear exception to the usury statute remedy makes the sudden application to rental-purchase agreements even more surprising, due to THORN Americas' full compliance with the Rental-Purchase Act.

The "definite and precise" terms of the Credit Sales Act were not only given judicial gloss, as in *Bouie*, but the state court actually read a new term into the statute – a

---

[5] Rent-A-Center had also made a general acknowledgment in its 1983 prospectus that: "if these laws [credit sales laws] were found to be applicable to the Company's rental agreements, the rental payments made to the Company may not come within the applicable state interest rate and finance charge limitations." This acknowledgment was made seven years before the enactment of the Rental-Purchase Act and did not specify Minnesota law. Moreover, as noted above, one year later legal counsel, after considering Minnesota law, expressly concluded that under Minnesota law the rental-purchase agreements were not credit transactions. Finally, as the Court in *Bouie* observed: "The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants." 378 U.S. at 355 n.5.

term that created an unprecedented link to the usury law. Such judicial blue penciling was not only unexpected (due to its elimination of the need to prove the essential elements of a penal statute that had traditionally been strictly construed), but also was simply impossible to predict. Nor was it foreseeable that the state court would render the credit requirement of the Credit Sales Act meaningless. Indeed, a panel of the Minnesota Court of Appeals in *Colortyme* had rejected out-of-hand the extension of the Credit Sales Act to rental-purchase agreements sought by the plaintiffs precisely because no credit was granted to the rent-to-own customers. *Miller v. Colortyme Inc.*, 504 N.W.2d 258 (Minn. Ct. App. 1993). The Minnesota Supreme Court's interpretation of the Credit Sales Act completely disregarded the plain language of the statute, had no support in the legislative history, and was contrary to the law defining credit transactions. This amounted to pure judicial activism that even the most vigilant lookout could not have foreseen.

THORN Americas' full compliance with the Rental-Purchase Act makes the Minnesota Supreme Court's analysis even more shocking. The Rental-Purchase Act expressly states that if it conflicts with the Credit Sales Act, the Rental-Purchase Act controls. Minn. Stat. § 325F.85 at App. 64. Under the Rental-Purchase Act, the transactions are defined as leases, not credit sales, and a lessor is required to disclose the leases as "rental-purchase agreement[s]." Minn. Stat. § 325F.86 at App. 64; § 325F.88, subd. 1 at App. 68. Under the new interpretation of the Credit Sales Act the transaction must be disclosed as a credit sale. Also under the Rental-Purchase Act the lessor owns the property, while under the Credit

Sales Act the lessee does. The state court's failure to recognize the conflicts between the statutes and to defer to the Rental-Purchase Act was in direct contravention of the plain language of the Rental-Purchase Act. The end result is that the Rental-Purchase Act has been repealed by judicial fiat because under Minnesota law after *Colortyme/Fogie* such agreements are, in effect, unlawful. Indeed, under the *Colortyme/Fogie* decision, Minnesota lawmakers had (unbeknownst to them) legislated the rental-purchase industry out of existence in 1981 when they amended the Credit Sales Act – nine years before the same legislature enacted the comprehensive Rental-Purchase Act to govern that industry. Not even a clairvoyant person could have foreseen the tortured path that led to this sudden and unusual end to the rental-purchase industry in Minnesota.

The court of appeals utterly failed to apply the important due process principles underlying *Bouie*. Instead, it simply concluded that the state court determination was not a change in the law but merely "a judicial interpretation of the statutory scheme." 95 F.3d at 650 at App. 13. This characterization, however, could be used to excuse any judicial expansion of a statute, including the one at issue in *Bouie*. Contrary to the court of appeals' analysis, the "judicial interpretation" here, as demonstrated above, worked a completely unexpected and unforeseeable change in the law in light of the plain language of all the applicable statutes and prior judicial interpretation. If this change had occurred in a criminal statute, the due process principles of *Bouie* would plainly have required that it not be retroactively applied. This case thus presents the Court with the opportunity to

make clear that the principles of *Bouie* also apply as well to the retroactive application of changes in civil laws when the consequences are penal in nature.

It is of course the business of Minnesota courts if they wish to construe Minnesota law in an incorrect and unreasonable manner, and that is not what petitioners challenge. It is also presumably within Minnesota's power effectively to make it economically unfeasible to engage in the rent-to-own industry in the future. The federal court in this case is not empowered, however, to apply retroactively the completely unforeseeable change in law that occurred, because to do so would violate due process. Thus, it is important to note that petitioners' purpose in describing the tortured path of decision in the state court is not to persuade this Court that the Minnesota Supreme Court erred in interpreting the Credit Sales Act and usury statute, but instead to establish that no reasonable person could have foreseen what happened in the Minnesota Supreme Court. It is the federal court's retroactive application of this unforeseeable, radical change in the law that constitutes a clear violation of due process and provides this Court with the opportunity to make clear that the principles of *Bouie* apply to outrageous, retroactive applications of the law in the civil context as well.

This Court needs to make explicit that which is already implicit in the developing body of due process case law – namely, that due process requires fair notice of all severe, penal judgments, whether due to criminal or civil liability, before they are imposed. The absence of an explicit case precedent on this point leaves the risk of fundamentally unjust deprivations of due process

through the exaction of unnoticed civil penalties. The Court can fill this gap now. The Court should grant the petition to clarify the constitutional limits on retroactive applications of law that result in severe civil penal judgments without prior notice, for events that occurred under a different legal regime.

II. THIS COURT SHOULD DECIDE WHETHER A VAGUENESS CHALLENGE TO A STATUTE INVOLVING SEVERE CIVIL PENALTIES REQUIRES SOMETHING MORE THAN A MERELY "TOLERANT" REVIEW

As argued above, it was a violation of due process to apply the severe civil penalty provisions of state usury law to already-completed transactions when those transactions are only regarded as unlawful because of a radical and unexpected change in state law articulated for the first time in the case at hand. The court of appeals improperly dodged application of the due process principles articulated in *Bouie* to civil penalties by holding that the state law announcement here did not work a "change" in the law, but rather was merely a "reasonable and correct interpretation of the law." 95 F.3d at 641 at App. 13. As set forth above, that circumlocution does not square with the state of the law prior to the decision here, nor does it alleviate the *Bouie* problem. What it does do, however, is create a related constitutional problem: If the "interpretation" given the state law by the state supreme court in answer to the certified questions here was not "new," but was merely the exposition of law that was somehow latent within the words of the statutes, the constitutional problem then becomes one of vagueness.

See, e.g., Gentile v. State Bar of Nev., 501 U.S. 1030, 1033-34, 1048 (1991) (state supreme court decision finding petitioner in violation of rule despite rule's safe harbor provision "raises concerns of vagueness" in that, given the interpretation of the rule by the state supreme court in his case, the "safe harbor provision . . . misled petitioner").

The vagueness at issue is not with the law as it existed following the new "interpretation" by the state supreme court; state law as it now stands is clear that the Credit Sales Act obviates "by operation of statute" the need to prove two elements of the usury law. The vagueness problem is with the law as it existed *before* that "interpretation." As shown above, the Credit Sales Act does not refer to the usury laws. Before the new "interpretation," there was no connection between them, and a person of ordinary intelligence did not have a reasonable opportunity to know what was prohibited and thus could not conform his or her conduct accordingly. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Indeed, as also shown above, a person who took the opportunity to review the laws would have found not only the lack of reference between the Credit Sales Act and the usury law, but would also have found the usury law's requirement of four elements, the long history of strict construction of the need to meet all four elements because of the law's penal character, and the separate and detailed regulation of rent-to-own contracts by the Rental-Purchase Act, which also does not reference the usury law and which the contracts at issue do not violate.

In *Gentile*, the Court held that a state court rule was void for vagueness because its "safe harbor provision" misled the petitioner into thinking he could make certain

statements at a press conference without fear of discipline. 501 U.S. at 1048. Similarly, provisions of the statutes at issue in this case reasonably led petitioners to believe that conformance with the Rental-Purchase Act was a "safe harbor." *See* Minn. Stat. § 325F.85 at App. 64 (if the Rental-Purchase Act conflicts with the Consumer Credit Sales Act, the Rental-Purchase Act governs); Minn. Stat. § 334.03 at App. 82 (excepting from the remedies under the usury statute "such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute").

If the "interpretation" rendered by the state supreme court was indeed latent within those laws, it was too hidden for a person of ordinary intelligence to find. As a result, one of the rationales for applying a "less strict vagueness test" to economic regulation does not obtain here. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) ("[E]conomic regulation is subject to a less strict vagueness test because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."). Moreover, as in *Gentile*, the statutes at issue here, due to their vagueness, create a "trap for the wary as well as the unwary." 501 U.S. at 1051. Rent-A-Center's franchisee's legal counsel opined in 1984, after reviewing the law, that the Credit Sales Act *did not apply*. *See id.* ("The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary."). Six years later, after enactment of the Rental-Purchase Act, the prospect that the usury laws applied became even more remote.

Thus, if this new "interpretation" had been rendered in a criminal context to hold petitioners criminally liable, it would have been struck down as violating vagueness principles under the rule of several decisions of this Court. *See, e.g., Grayned*, 408 U.S. at 108 n.3 (collecting cases). The court of appeals, however, refused to apply the rule of those decisions because it understood *Village of Hoffman Estates*, to "require" that a "more tolerant" test for vagueness be applied here:

> We reject RAC's contention that the strict test applicable to criminal statutes governs here. The statutes implicated in this case are primarily economic regulations which cover a narrow subject area and regulate the conduct of business enterprises. The punitive aspects of the usury statute impose only civil penalties. Under *Village of Hoffman*, we conclude that the broader, more tolerant test of vagueness is required here.

95 F.3d at 650 at App. 10.

In *Village of Hoffman Estates*, however, this Court was not squarely confronted with a statute which imposed severe civil penalties such as the tens of millions of dollars respondents claim are at issue here.[6] Nor did the court of appeals take cognizance of this Court's decision

---

[6] The ordinance at issue in *Village of Hoffman Estates*, which required a license to sell certain "drug paraphernalia," provided for "civil" fines of from $10 to $500 per violation. 455 U.S. at 492. The village conceded that the ordinance was "quasi-criminal," and that therefore a "relatively strict test" for vagueness may be warranted. *Id.* at 499. The Court did not have to concern itself further with the test "because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside." *Id.* at 500.

in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).[7] In *Gore*, this Court did have before it the "primarily economic regulation" that substantial punitive damages exert over "the conduct of business enterprises" in the civil context. And while it noted that "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases," *id.* at 1598 n.22, it also made clear that, if "civil *penalties*," *id.* (emphasis in original), are to be imposed, then constitutional safeguards requiring adequate notice must be met. *Id.*

This case thus squarely presents the Court with the opportunity, following *Gore*, to define the test that is required for application of vagueness analysis where severe civil penalties are at issue.[8] This Court has not had the opportunity to clearly rule on the proper vagueness test to apply in a situation where a civil statute, penal in nature, is applied retroactively. While the "strict" test

---

[7] *Gore* was decided after briefing and argument had taken place before the Eighth Circuit in this case. It was, however, called to the court of appeals' attention in the petition for rehearing.

[8] Courts have applied a heightened due process standard in the administrative law context to protect parties from suffering civil sanctions without fair notice. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 122-24 (7th Cir. 1981); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335 (6th Cir. 1978). Courts of appeals, as in *Kropp Forge* and *Diebold*, have relied on a stringent vagueness test to preclude application of a civil penalty in the absence of a warning.

afforded criminal defendants may not be directly applicable, something much more cognizant of the severe effect of retroactive penal sanctions than the "tolerant" view applied by the court of appeals is required. Under the circumstances of this case, application of any test beyond the very "tolerant" would necessitate reversal of the court of appeals' decision.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JANICE M. SYMCHYCH
Counsel of Record
STEVEN J. WELLS
PETER W. CARTER
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-6336

SHANNON L. SPANGLER
SHOOK, HARDY & BACON L.L.P.
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550

February 3, 1997

APPENDIX A

Vickie FOGIE, Joan Leonard, and Angela Adams, on behalf of themselves and all other similarly situated, Plaintiffs/Appellees,

v.

THORN AMERICAS, INC. (formerly known as Rent-A-Center, Inc.) a Kansas corporation, and THORN EMI North America Holdings, Inc., a Delaware Corporation, Defendants/Appellants.

No. 95-3694.

United States Court of Appeals,
Eighth Circuit.

Submitted April 8, 1996.

Decided Sept. 6, 1996.

Rehearing and Suggestion for Rehearing
En Banc Denied Nov. 4, 1996.*

Members of certified class who entered into rent-to-own rental purchase agreements brought action against rental company, alleging that contracts violated Minnesota usury law, Minnesota Consumer Credit Sales Act (CCSA), and federal Racketeer Influenced and Corrupt Organization (RICO) statutes. The United States District Court for the District of Minnesota, Michael James Davis, J., 1995 WL 649575, permanently enjoined rental company from entering into usurious rent-to-own consumer credit sales contracts, and rental company appealed. The Court of Appeals, James M. Burns, Senior District Judge, sitting by designation, held that: (1) usury statute was not

---

* Judge Bowman would grant the suggestion.

unconstitutionally vague; (2) plaintiff class proved that cost of lease services in the contracts constituted usurious interest; (3) contracts did not fall within time-price doctrine; and (4) injunction was properly ordered.

Affirmed.

John C. Dods, Kansas City, MO, argued (Dennis R. Dow, Shannon L. Spangler, Kansas City, MO, and J. Patrick McDavitt, Minneapolis, MN, on the brief), for appellants.

Kay Nord Hunt, Minneapolis, MN, argued (Phillip A. Cole, Minneapolis, MN, David L. Ramp, New Brighton, MN, Seymour J. Mansfield and Richard J. Fuller, Minneapolis, MN, on the brief), for appellees.

Before McMILLIAN and FAGG, Circuit Judges, and BURNS,** District Judge.

JAMES M. BURNS, Senior District Judge.

Appellants THORN Americas, Inc. and THORN EMI North America Holdings, Inc. appeal the district court's[1] order granting summary judgment for the plaintiff class and permanently enjoining appellants from entering into usurious "rent-to-own" consumer credit sales contracts. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm.

** The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

I. BACKGROUND

Appellant THORN Americas, Inc. operates a chain of stores that offer a variety of household goods for sale or lease. Appellant THORN EMI North America Holdings, Inc. owns all of the stock of THORN Americas, Inc. Appellants operate their stores under the business name "Rent-A-Center" and are collectively called "RAC" in this opinion. Appellees are individual members of a certified class who entered into rent-to-own transactions with RAC on or after August 1, 1990.

RAC leases household goods to its customers for a weekly or monthly rental term. At the end of the initial weekly or monthly rental period, the customer may renew the agreement for another term. The lease may be renewed at the end of each rental term. Full payment of the rental fee is required at the beginning of each term.

RAC uses a standard form contract for each renewable lease agreement. RAC entered into thousands of such contracts with members of the plaintiff class. The renewable lease agreements between RAC and the members of the plaintiff class are known interchangeably as "the rental purchase contracts" or "the rent-to-own contracts".

The standard rental purchase contract allows a class member to acquire ownership of an item by renewing the lease for a specified number of consecutive rental periods. In the standard form contract, this method of acquiring title is called "renewing the agreement to ownership". Items may also be purchased for cash on an

immediate sale basis.[2] However, the vast majority, if not all of RAC's business is conducted through rental purchase contracts.

The cash price of an item is set at 55% of the total payments necessary to purchase the item by renewing the agreement to ownership. The cash price of an item is prominently displayed on the item and is included in the standard form rental purchase contract. The difference between the total payments needed for renewal to ownership and the cash price is called the "cost of lease services".[3] The rental purchase contracts state the cost of lease services amount.

Appellees have successfully contended that the difference between the cash price and the total of payments to acquire title by renewing the agreement to ownership, i.e. the amount known as the cost of lease services, is actually entirely interest. Based on that central contention, the class members brought this action alleging that the rent-to-own contracts violated several state and federal statutes, including the Minnesota Consumer Credit Sales Act (CCSA), Minn.Stat. §§ 325G.15-.16, the Minnesota General Usury Statute, Minn.Stat. §§ 334.01-.03; and the federal Racketeer Influenced and Corrupt Organization statute (RICO), 18 U.S.C. § 1961.

---

[2] The plaintiff class did not assert any claim against appellants based on immediate sales of goods for cash.

[3] We use the definition of "cost of lease services" employed in RAC's form contracts rather than the definition employed by the district court.

The district court certified two questions to the Minnesota Supreme Court:

> 1. Are rent-to-own contracts consumer credit sales under Minn.Stat. § 325G.15?
>
> 2. Does the usury statute, Minn.Stat. § 334.01, apply to rent-to-own contracts?

On June 24, 1994, the Minnesota Supreme Court issued its opinions in *Miller v. Colortyme, Inc.*, 518 N.W.2d 544 (Minn.1994) and *Fogie v. Rent-A-Center, Inc.*, 518 N.W.2d 544 (Minn.1994). The Court answered both certified questions in the affirmative.

The plaintiff class then brought its motion for partial summary judgment seeking declaratory and injunctive relief. On September 28, 1995, the district court issued its order enjoining appellants from entering into credit sales transactions within the State of Minnesota which bear interest in excess of the maximum rate permitted under Minnesota law. The district court's order also declared the rental purchase contracts to be consumer credit sales contracts subject to the Minnesota General Usury Statute. It declared that the rental purchase contracts constitute "unlawful debt" as defined under RICO. Finally, the district court declared the rental purchase contracts void *ab initio* and set forth a formula and procedure for determining money damages.

II. Scope of Review

We must resolve issues relating to the jurisdiction of this court at the outset. We have jurisdiction to review the district court's issuance of the injunction under 28 U.S.C.

§ 1292(a)(1) which provides for appeal of interlocutory orders granting or refusing to grant injunctions. Our jurisdiction under section 1292(a)(1) also extends to the remainder of the appealed order to the extent the injunction is "interdependent with" the remainder of the appealed order. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 459 U.S. 988, 103 S.Ct. 342, 74 L.Ed.2d 383 (1982); *Union Nat. Bank of Little Rock v. Federal Nat. Mortg. Ass'n*, 860 F.2d 847, 852 (8th Cir.1988). Under this standard, we have jurisdiction to review all portions of the order that are dependent on the resolution of the issues necessarily resolved in reviewing the injunction order. *Union Nat. Bank v. Federal Nat. Mortg. Ass'n*, 860 F.2d at 852. In other words, in addition to the injunction order, we may review other issues only if they are "inextricably bound up" with the injunction. *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir.1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). We need not undertake a review of issues whose resolution is not necessary to effectively review the injunction. *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 48 F.3d 373, 375 (8th Cir.1995).

We must determine the extent to which each issue RAC has appealed is relevant to, or interdependent with, or inextricably bound up with the injunctive relief granted in this case.

First, the propriety of the summary judgment in favor of the plaintiff class on its usury claim is properly before us on appeal, because the district court's determination that the rental purchase agreements are usurious is the very basis of the injunction. Second, the

issues surrounding the time-price doctrine and appellants' constitutional claims are properly before us because the district court's rejection of these defenses was a necessary predicate to entry of the injunction.

The remaining issues are more problematic. RAC asks us to review the district court's finding that the rental purchase agreements satisfy the "unlawful debt" element of RICO. The district court retained jurisdiction to make determinations on the remaining elements of the RICO claim. In the interest of avoiding piecemeal appeals, it would be appropriate to review the RICO claim in its entirety after a final judgment has been rendered. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978). Furthermore, it is not necessary to determine whether the rental purchase contracts satisfy the "unlawful debt" element of the RICO claim in order to effectively review the injunction order. Accordingly, we decline to exercise jurisdiction to review this ruling. *Mille Lacs Band*, 48 F.3d at 375; *Union Nat. Bank v. Federal Nat. Mortg. Ass'n*, 860 F.2d at 852; *Marathon Oil Co. v. United States*, 807 F.2d at 764.

For the same reasons, we decline to review the district court's order establishing the formula for calculating money damages and the procedure by which class members are to assert claims for money damages. The district court retained jurisdiction to determine damages in this case. It is appropriate to avoid piecemeal appeals by deferring review of these issues until final money judgments have been entered. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. at 480, 98 S.Ct. at 2453. In addition, we do not find it necessary to resolve these issues in

order to effectively review the injunctive relief granted here. Issues regarding the proper method for calculating damages are not inextricably bound up with the injunction issued here. *Mille Lacs Band*, 48 F.3d at 375; *Union Nat. Bank v. Federal Nat. Mortg. Ass'n*, 860 F.2d at 852; *Marathon Oil Co. v. United States*, 807 F.2d at 764.

III. Standards of Review

We review a grant of summary judgment *de novo*. *Hardin v. Hussmann Corp.*, 45 F.3d 262, 264 (8th Cir.1995). We will affirm if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir.1994).

Our review of the grant or denial of a permanent injunction is confined to the determination of whether the district court abused its discretion. *International Ass'n of Machinists and Aerospace Workers v. Soo Line R. Co.*, 850 F.2d 368, 374 (8th Cir.1988) (en banc), *cert. denied*, 489 U.S. 1010, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989). Abuse of discretion occurs if the district court reaches its conclusion by applying erroneous legal principles or relying on clearly erroneous factual findings. *Id.*, 850 F.2d at 374; *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir.1994).

IV. Discussion

A. Summary Judgment on Usury Claim

The district court held that RAC's rent to own contracts are usurious as a matter of law. Under the state general usury statute, four elements must be proven to establish a violation: 1) a loan of money or forbearance of debt; 2) an agreement between the parties that the principal shall be repayable absolutely; 3) the exaction of a greater amount of interest than is allowed by law, and 4) the presence of an intention to evade the law at the inception of the transaction. *Miller v. Colortyme,* 518 N.W.2d 544, 549-50 (Minn.1994); *Citizen's National Bank of Willmar v. Taylor,* 368 N.W.2d 913, 918 (Minn.1985).

1. Constitutional Challenges

The district court held that, under Minnesota law as set forth in *Miller v. Colortyme* and *Fogie v. Rent-A-Center,* the first two elements of usury are satisfied by operation of the CCSA and the general usury statute. 518 N.W.2d at 549, 518 N.W.2d 544. RAC argues that, by applying the CCSA and the usury statute to it's rental purchase transactions in this manner, the district court violated RAC's constitutional rights.

First, RAC contends the *Miller* interpretation renders the CCSA and the usury statute unconstitutionally vague, depriving RAC of the "fair notice" required by the Due Process Clause. RAC also contends that the district court retroactively applied the *Miller* decision in violation of the Ex Post Facto and Due Process Clauses. We reject both contentions.

a. Vagueness

The Supreme Court enunciated standards for evaluating claims of vagueness in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). First, the prohibitions of a statute must be defined clearly enough that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited. Second, the statute must provide standards that are clear enough that those charged with applying the statute are not required to make basic policy decisions on a subjective or arbitrary basis. *Id.*

These standards are not to be applied mechanically. Criminal enactments are to be examined under a stricter vagueness test while economic regulation is subject to a more tolerant examination. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). We reject RAC's contention that the strict test applicable to criminal statutes governs here. The statutes implicated in this case are primarily economic regulations which cover a narrow subject area and regulate the conduct of business enterprises. The punitive aspects of the usury statute impose only civil penalties. Under *Village of Hoffman*, we conclude that the broader, more tolerant test of vagueness is required here. 455 U.S. at 498-99, 102 S.Ct. at 1193.

Applying these standards, we hold that the *Miller* decision of the Minnesota Supreme Court does not render the CCSA or the general usury statute unconstitutionally vague. The CCSA defines "Sale of Goods" in terms that clearly encompass terminable leases including RAC's rental purchase agreements. Minn.Stat. 325G.15 subd. 5.

The CCSA incorporates this definition of "Sale of Goods" into its definition of "Consumer Credit Sales". Minn.Stat. 325G.15 subd. 2. Any lease that constitutes a consumer credit sale under the CCSA is deemed a sale for all purposes. Minn.Stat. 325G.16 subd. 4.

RAC contends that their rental purchase agreements, though statutorily defined as "sales", cannot be "consumer credit sales" because the seller does not extend credit and the buyer does not incur debt. This construction is untenable because it would render section 325G.15 subd. 5 entirely meaningless and unnecessary. Moreover, the terms of RAC's rental purchase agreements provide for buyers to acquire possession of goods while deferring payment over time. These are the essential attributes of an ordinary credit sale. It is clear that the legislature intended for CCSA consumer protections governing ordinary credit sales to also govern rental purchase agreements having the same essential attributes. Accordingly, the construction proposed by RAC would render subdivision 5 meaningless and would also frustrate the legislative intent and hinder the consumer protection objectives of the statute.

These statutory provisions give sufficient notice to those engaged in the rent-to-own industry that their rental purchase contracts fall within the CCSA and are subject to usury laws. They also provide standards by which the courts can apply the statutes without engaging in subjective or arbitrary policy making decisions. Accordingly, the statutes pass the vagueness test enunciated in *Grayned v. City of Rockford* and *Village of Hoffman Estates.*

b. Retroactive Application of Miller v. Colortyme

Two elements are necessary for a statute to be ex post facto in violation of the Constitution[4]: it must apply to events that occurred before its enactment; and it must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987); *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). The CCSA, the RPAA, and the general usury statute existed in their present form when the parties entered into the rental purchase contracts at issue in this case. Accordingly, the statutes themselves are not subject to ex post facto analysis.

A judicial decision which meets both elements also violates the ex post facto clause and cannot be applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-1703, 12 L.Ed.2d 894 (1964). This occurs when a judicial decision unforeseeably enlarges a statute to cover conduct that was not offensive before the judicial pronouncement. *Id.* If the judicial construction is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it violates the ex post facto clause and must not be given retroactive effect. *Bouie v. City of Columbia*, 378 U.S. at 354, 84 S.Ct. at 1703.

---

[4] We assume without deciding that the third critical element, that the statute be a criminal or penal law, is satisfied in this case.

RAC contends the Minnesota Supreme Court's decision in *Miller v. Colortyme* changed the substantive elements of a usury claim by making it unnecessary for plaintiffs to prove the first two elements, the extension of credit and the absolute obligation to repay it. In RAC's view, the *Miller* decision acts as an ex post facto law and must not be applied retroactively.

The *Miller* decision did not change the elements of a usury claim. It is a judicial interpretation of the statutory scheme that existed long before the present contracts were made. The judicial construction in *Miller* is not "unexpected or indefensible by reference to" the statutory framework already in place. On the contrary, the judicial construction of those statutes is reasonable and foreseeable, gives full meaning to the statutory language, operates in the manner clearly intended by the legislature, and furthers the consumer protection objectives of the statutes. In addition, *Miller* does not overrule any prior contrary ruling of the Minnesota Supreme Court upon which RAC might justifiably have relied.

In short, *Miller* did not change existing law – it simply stated a reasonable and correct interpretation of the law which differs from the erroneous view RAC had chosen to follow.

For the reasons stated above, RAC's constitutional challenges to the *Miller v. Colortyme* decision must be rejected. The district court was correct in ruling in accordance with *Miller,* that the first two elements of the usury claim in this case are established by operation of the CCSA and the usury statute.

2. *Factual Challenges*

RAC contends the plaintiff class failed to carry its burden of proving the third and fourth elements of their usury claim: exaction of interest at an illegal rate and the intent to evade the usury law when the contract was made. We view the evidence in the light most favorable to RAC. *Bashara v. Black Hills Corp.*, 26 F.3d at 823.

a. Amount of Interest Charged

The plaintiff class urged the district court to find that the difference between the total payments needed to purchase an item by renewing the contract to ownership and the cash price was entirely interest. It cannot be disputed that this amount, described in the rental purchase agreements as the "cost of lease services", is 82% of the cash price in each contract. Adjusting this figure for the duration of the various contracts among the plaintiff class members produces annual percentage rates ranging between 46% for the longest contract and 746% for the shortest. Obviously, these rates far exceed the legal limit under the usury statute, Minn.Stat. § 334.01.[5]

RAC contends that the cost of lease services cannot be entirely interest because it includes the value of services such as delivery, maintenance, repair, and contract options. If the case had gone to trial, RAC intended to

---

[5] The general usury statute permits a maximum interest rate of six percent per annum unless the rate is contracted for in writing, in which case a rate of eight percent may be charged. Minn.Stat. § 334.01.

present evidence to show the value of these additional services.

The district court found no evidence that the members of the plaintiff class agreed to pay for any additional services. The court also found that, even if the "cost of lease services" figure included both interest and the value of additional services, no reasonable fact finder could conclude that the portion attributable to the value of additional services was great enough so that the interest portion was below the statutory usury rate. A close review of the record discloses that the district court was correct in both findings.

It is proper to exclude from the interest calculation "a certain sum, agreed to be paid the lender for services and expenses in connection with the loan" if the charge is reasonable and bona fide. *Hobart v. Michaud*, 174 Minn. 474, 219 N.W. 878, 879 (1928); *Daley v. Minnesota Loan and Inv. Co.*, 43 Minn. 517, 45 N.W. 1100, 1101 (1890). However, if the fee is not related to any separate expenses but is compensation for the use of the money loaned, it must be considered interest. *VanderWeyst v. First State Bank of Benson*, 425 N.W.2d 803, 811 (Minn.), *cert. denied*, 488 U.S. 943, 109 S.Ct. 369, 102 L.Ed.2d 359 (1988).

RAC contends the plaintiff class members agreed to pay the value of additional services because they each agreed to the general "cost of lease services" term in the written contracts. RAC's expert claimed that the value of each of the following services should be excluded from the interest calculation: delivery, maintenance, repair and replacement. RAC contends it is not required to itemize

the additional services covered by the term "cost of lease services".[6]

The undisputed evidence shows that the parties contemplated each of the services identified by RAC's expert would be provided without charge. In the express written terms of each of the contracts, the delivery charge indicated is "$0.00". In its published advertisements, RAC announced that delivery, repair, service, set up, and "loaners" were free services. We are convinced that no fact finder could view this evidence and reasonably conclude that the plaintiff class members knowingly agreed to pay for these services as "cost of lease services".

RAC's expert also identified certain "contract options" including the right to continue renting; the right to stop renting; and, the right to obtain ownership over time by the two methods described in the contracts. RAC contends the value of these "options" should be excluded from "cost of lease services" in calculating the interest charged by RAC.

The Minnesota Supreme Court, after fully considering the very contracts at issue here, including the rights described now by RAC as "options", ruled that these contracts are consumer credit sales contracts. *Fogie v. Rent-A-Center,* 518 N.W.2d at 544. Describing the contract's terms as "options" does not change its nature.

---

[6] We believe the RPAA requires full disclosure of the service charges associated with a rental purchase contract. Minn.Stat. § 325F.86-.87. However, compliance with the RPAA is not the issue. Itemization of charges is relevant to the usury analysis only if it tends to prove or disprove that "cost of lease services" is truly a service charge rather than interest.

These so-called "options" are simply the rights enjoyed by any consumer credit sale purchaser. The compensation paid for the right to acquire ownership by paying the purchase price over time in a consumer credit sale is interest. Likewise, the compensation collected by the seller for the risks associated with collecting the purchase price over time is interest. Simply calling the rights and risks associated with credit sales "options" does not entitle the seller to additional compensation in excess of the usury rate.

Accordingly, by process of elimination, we must conclude that the "cost of lease services" term in the rental purchase contracts is interest. To the extent the value of any additional service or option is included, we agree with the district court that no fact finder could reasonably conclude such value is sufficient to reduce the 46% to 746% range of annual percentage rates charged by RAC to a nonusurious level.

The district court properly found that the third element of the usury claim has been established.

b. Intent

RAC contends that summary judgment is improper because the plaintiff class failed to prove the fourth element, intent to evade the usury law. "Intent" for the purposes of usury law consists in the intent to take more interest than allowed by law; it is not necessary that the person taking the interest knows he is violating the usury law. *Trapp v. Hancuh,* 530 N.W.2d 879, 885 (Minn.App.1995); *Citizen's Nat. Bank of Willmar v. Taylor,*

368 N.W.2d 913, 919 (Minn.1985). If the evidence shows a direct contract whereby the lender exacts excessive interest, the intent to evade the law is presumed. *Fred G. Clark Co. v. E.C. Warner Co.*, 188 Minn. 277, 247 N.W. 225, 229 (1933).

In this case the contracts provide for RAC to exact interest in excess of the usury rate and there is no claim by RAC that it did not intend to collect less money than is stated in the contracts. Accordingly, as a matter of law, RAC had the requisite intent under the usury statute. *Miller v. Colortyme*, 518 N.W.2d at 550.

RAC contends that it should be relieved of the presumption of intent because it reasonably relied in good faith on the existing law. *Washington Federal Sav. & Loan Ass'n of Stillwater v. Baker*, 374 N.W.2d 786, 788 (Minn.App.1985). We reject this argument for the same reasons we rejected RAC's constitutional challenges. RAC's reliance on a strained and erroneous construction of the statutory scheme is not the kind of good faith reliance that brings this exception into play.

3. *Time-Price Doctrine*

RAC contends that the plaintiff class is not entitled to judgment as a matter of law because their rental purchase contracts fall within the time-price doctrine. This doctrine was based on the central premise that there can be no usury without a loan or forbearance of money and that the sale of property in a time-price transaction involves no loan. *Dunn v. Midland Loan Finance Corporation*, 206 Minn. 550, 289 N.W. 411, 413 (1939); *St. Paul Bank for*

Cooperatives v. Ohman, 402 N.W.2d 235, 238 (Minn.App.1987). The time-price doctrine was judicially created and is not an exception to usury law, but recognizes transactions which are outside the scope of usury law. *St. Paul Bank v. Ohman*, 402 N.W.2d at 238.

RAC's argument is foreclosed by the rulings of the Minnesota Supreme Court. In *Fogie v. Rent-A-Center, Inc.*, the Court ruled in no uncertain terms that the usury statute, Minn.Stat. § 334.01 applies to rent-to-own contracts. 518 N.W.2d at 544. Accordingly, RAC cannot now argue that its rental purchase agreements are transactions which fall outside the scope of the usury law. Furthermore, the loan or forbearance element of usury, missing in time-price transactions, is satisfied in rental purchase agreements by operation of statute. *Miller v. Colortyme, Inc.*, 518 N.W.2d at 549. In addition, the Minnesota Supreme Court has been unwilling to expand the time-price doctrine unless justified by economic needs and social attitudes making the protections of the usury statute unnecessary. *Rathbun v. W.T. Grant Company*, 300 Minn. 223, 219 N.W.2d 641, 647 (1974). We find no such justification here.

"We are bound to apply state law as we are able to discern it from the rulings of the state's courts." *Boner v. Eminence R-1 School Dist.* 55 F.3d 1339, 1341 (8th Cir.1995), *quoting Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1310 (8th Cir.1993). Under the applicable state case law, it is clear that RAC's rental purchase contracts do not fall within the time-price doctrine and are subject to the usury statute.

B. Injunction Order

We review the district court's grant of a permanent injunction for an abuse of discretion. *United States v. Green Acres Enterprises, Inc.*, 86 F.3d 130, 132 (8th Cir.1996); *Soo Line R. Co.*, 850 F.2d at 374. Abuse of discretion occurs if the district court reaches its conclusion by applying erroneous legal principles or relying on clearly erroneous factual findings. *Id.*

The Eighth Circuit balances four factors to determine whether injunctive relief is warranted: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the harm to be suffered by the nonmoving party if the injunction is granted; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc). The standard is the same for a permanent injunction except that the movant must show actual success on the merits. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12, 94 L.Ed.2d 542 (1987). The district court did not make explicit findings with respect to these four factors. However, by prevailing on its usury claim the plaintiff class has demonstrated that the four factors of this test overwhelmingly militate in favor of an injunction.

As demonstrated in this opinion, the plaintiff class has shown actual success on the merits. In addition, public interest overwhelmingly favors enjoining these contracts. The public policy of Minnesota is revealed in its consumer protection statutory scheme including the usury statute, the CCSA and the RPAA. The actions

enjoined here violate the letter and spirit of this statutory scheme and are clearly against the public interest. To balance against this, the only harm to RAC is the loss of the usurious portion of its income.

RAC contends that the plaintiff class has failed to show irreparable injury because the district court has established a formula for calculating money damages. However, this formula only compensates for past damages and only reaches class members who have been identified. Estimating future losses of similarly situated individuals if RAC continues its practices is virtually impossible, as is identifying those potential victims of their practices. Giving due weight to each of the four factors, we are satisfied that there has been no abuse of discretion by the district court.

V. Conclusion

Based on the foregoing, the district court's order granting summary judgment for the plaintiff class and enjoining RAC from entering into usurious credit sales transactions is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Rent-A-Center, Inc. a Kansas corporation, TEUSA Holdings, Inc., a Delaware corporation, Thorn EMI (USA) Inc., a Delaware corporation, and Thorn EMI North American Holdings, Inc., a Delaware corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

File No. 3-94-359

The above-entitled matter came on for hearing before the Honorable Michael J. Davis on plaintiffs' motion for partial summary judgment.

David L. Ramp, Esq., Mary King, Esq., Seymour J. Mansfield, Esq., and Phillip Cole, Esq., appeared for and on behalf of Plaintiffs.

J. Patrick McDavitt, Esq., John C. Dods, Esq., and Peter E. Strand, Esq., appeared for and on behalf of Defendants.

This is a class action involving rent-to-own transactions. Defendants offer a variety of household goods for sale or lease. The plaintiff class are individuals who

entered into rent-to-own contracts with Defendants on or after August 1, 1990. Under these contracts, a plaintiff class member could purchase the item for cash without entering into a rental agreement, or could acquire ownership after an initial rental period by paying a certain amount calculated by a particular formula. The final method to obtain ownership of an item would be to renew the rental agreement for the agreed upon time period as set forth in the rental agreement.

Plaintiffs have brought this class action arguing Defendants, through their rent-to-own contracts, violate a number state and federal statutes, such as the Consumer Credit Sales Act (CCSA), Minn.Stat. § 325G.15, Minnesota Consumer Fraud Act, Minn.Stat. § 325F.69, and Racketeer Influenced and Corrupt Organization (RICO), 18 U.S.C. § 1961, et. seq.

This case was previously assigned to the Honorable Diana Murphy, who certified the following two questions to the Minnesota Supreme Court:

1. Are rent-to-own contracts consumer credit sales under Minn.Stat. § 325C.15?

2. Does the usury statute, Minn.Stat. § 334.01, apply to rent-to-own contracts?

On June 24, 1994, the Minnesota Supreme Court determined that defendant's rent-to-own transactions are consumer credit sales under Minn.Stat. § 325C.15 and are subject to Minnesota's usury statute, Minn.Stat. § 334.01, for the reasons set forth in the opinion of *Miller v. Colortyme, Inc.*, 518 N.W.2d 544 (Minn.1994). *Fogie v. Rent-A-Center*, 518 N.W.2d 544 (Minn.1994).

Plaintiffs now move this Court for an Order declaring that Defendants' rent-to-own contracts are subject to the usury statute, and that such contracts are usurious as a matter of law. Plaintiffs also request this Court find, with respect to their RICO claim, that the interest rate charged by Defendants was more than twice the rate permitted by law. Finally, Plaintiffs seek a ruling as to the proper measure of damages for usury, and permanently enjoining Defendants from committing future usury violations.

Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49.

Analysis

1. Usury

Although the Minnesota Supreme Court was not asked to determine whether the contracts at issue in this case are usurious, the court did hold that similar rent-to-own contracts,[1] are consumer credit sales for all purposes, and that such contracts were usurious as a matter of law. *Miller*, 518 N.W.2d at 550. In making this determination, the court recognized the four elements of usury as:

> 1) a loan of money or forbearance of debt,
>
> 2) an agreement between the parties that the principal shall be repayable absolutely,
>
> 3) the exaction of a greater amount of interest or profit than is allowed by law, and
>
> 4) the presence of an intention to evade the law at the inception of the transaction.

Id., at 549 (*citing Citizen's Nat'l Bank of Willmar v. Taylor*, 368 N.W.2d 913, 918 (Minn.1985)). The court determined that the first two elements of usury are met by operation of statute, based upon its determination that rent-to-own contracts are consumer credit sales. *Id.* The court also determined that the fourth element of usury, intention to evade the law at the contract's inception, is also met by virtue of the fact that the defendant intended to collect all the money stated in the contract. *Id.*, at 550. It is not necessary to find the defendant knew he was violating

---

[1] The contracts addressed in *Miller* did not offer consumer items for immediate sale. *Miller*, 518 N.W.2d at 546. Defendants contracts do offer items for immediate sale. This is a difference without consequence, however, as to the usury analysis.

the usury law. *Id.* The court also found that a usurious rate of interest was charged in the absence of evidence establishing the difference between the total payments required, and the value of goods and services extended, amounted to less than six percent of the total payments. *Id.*

In this case, Defendants state that the cash price of an item is prominently displayed on each item and is included in the rental contract. The rental contract also includes an amount referred to as the "cost of lease services." The cash price is 55% of the total of payments required to complete the purchase of the goods over the term of the contract. It is Plaintiffs' contention that the difference between the cash price and the "cost of lease services" is interest, which clearly violates the usury laws which provides a maximum interest rate of $8 per $100 per year. Minn.Stat. § 334.01.

To determine whether a transaction is usurious, this Court must consider whether or not the transaction is, in substance, a contracting to receive usurious interest for a loan or forbearance of money. *Seebold v. Eustermann*, 216 Minn. 566, 13 N.W.2d 739, 744 (1944). "The process involves looking through form to the substance. No device or shift may be employed to conceal the true character of the transaction." *Id.*

Defendants make a number of arguments in opposition to Plaintiffs' request that the contracts at issue are usurious as a matter of law. In support of these arguments, Defendants rely upon its expert, Dr. Roman L. Weil. *See*, Weil Affividat [sic]. First, Dr. Weil opines that it is impossible to compute an interest rate for a rent-to-

own transaction at the inception of the transaction, because it is impossible to know how many payments the customer will make. Weil Aff., page 8. This argument is meritless, however, as usury analysis is conducted upon the terms of the contract as written, not as executed. *See Fred G. Clark v. E.C. Warner Co.*, 188 Minn. 277, 247 N.W. 225, 229 (1933).

Dr. Weil also opines that an interest rate cannot be computed because a Rent-A-Center customer does not borrow a principal amount. Weil Aff., page 9. Although technically, a rent-to-own customer does not incur a debt and does not have an absolute obligation to repay a principal amount, rent-to-own customers nonetheless "implicitly pay interest in return for the ability to pay for goods over time." *Id.*, at 549. Rent-to-own customers are entitled to the same protections as those consumers who purchase goods through ordinary installment sales. *Id.* Accordingly, the principal amount in rent-to-own transactions for purposes of computing interest, is the cash price.

Defendants also argue that the difference between the cash price and the costs of lease services should not represent interest. In its contracts, the only prices itemized are the cash price and the cost of lease services. Defendants argue that the cost of lease services includes a number of services, such as delivery, maintenance, and options such as option to renew etc. Defendants asserts [sic] that the interest rate cannot equal the difference between the cash price and the cost of lease services as such computation does not take into consideration the value of delivery, maintenance, etc.

Under certain circumstances, it is proper to exclude from an interest rate computation, a certain sum, agreed to be paid to a lender as services and expenses in connection with a loan, that is reasonable and bona fide. *Hobart v. Michaud*, 174 Minn. 474, 219 N.W. 878, 879-880 (1928). As noted above, Defendants do not itemize the different services alleged to be included in "cost of lease services." Plaintiffs argue that as a result, there is no evidence that the plaintiff class members who entered into a rental contract specifically agreed to the various services and the charges for such services. Defendants respond that it was not required by the Rental Purchase Agreements Act (RPAA), Minn.Stat. § 325F.84-98, to specifically identify the different services and the cost for such services. While the RPAA does not specifically direct Defendants to itemize difference [sic] services, the fact remains that rent-to-own contracts are consumer credit sales for all purposes. As such, Defendants must comply with all laws affecting consumer credit sales, including the usury laws. Defendants cannot escape usury liability by arguing they complied with the RPAA. Without an itemization of the services allegedly provided customers under its rent-to-own contracts, this Court cannot find that such costs for services were agreed upon, let alone reasonable or bona fide.

Defendant argues that it intends to present evidence at trial as to the different services provided and the value of such services. As to this assertion, this Court adopts the observation made by the court in *Miller*:

> no reasonable fact finder could conclude that the difference between the total payments required under the contracts and the value of

> the goods and services extended amounts to as little as six percent of the total payments.

Id., at 550.

Defendants next contend that summary judgment is inappropriate as the contracts at issue herein are excluded from usury liability under the time-price doctrine. This doctrine is a judicially created exception to the usury law applied to bona fide installment sales. *Dunn v. Midland Loan Finance Corp.*, 206 Minn. 550, 289 N.W. 411 (1939). This doctrine was created to recognize that usury only applies where there is a loan or forbearance of money, and that a sale of property does not involve such a loan or forbearance. *Dunn*, 206 Minn. at 553, 289 N.W. at 413. Accordingly, in a bona fide installment sale, a seller is entitled to set a cash price and a credit price, without making the transaction usurious. *Id.*

This doctrine does not apply in this case, however, because it has already been judicially determined that the usury statute applies to the rent-to-own contracts at issue. Furthermore, as noted by the Minnesota Supreme Court:

> [the time price] doctrine in its inception recognized the social conditions of the nineteenth century and the era of laissez-faire mercantilism that existed at that time. These cases usually involved items of high price which the buyer ordinarily could not afford to purchase with cash and a buyer and seller substantially on equal footing in bargaining over price and credit charges. The doctrine was expanded to cover items less unique and costly, but it was not until the practice of installment buying became a common consumer practice that it gained wide

> acceptance. This application of the exception to the usury law did a disservice to the original concept of that law, which was to protect weak and needy persons from the overreaching of economically superior renters of capital. It is apparent that the bargaining position of installment buyers may be as disadvantageous today as that of borrowers. Thus, any expansion of this doctrine must be justified in light of the economic needs and social attitudes as they now exist.

Rathbun v. W.T. Grant Co., 300 Minn. 223, 232, 219 N.W.2d 641, 648 (1974). The plaintiff class was not, and is not, on equal footing with Defendants for they do not have any say in setting the cash price and the credit price. As in *Rathbun*, this Court finds no justification for extending the time-price doctrine to the rent-to-own contracts at issue herein.

Defendants also assert that the Minnesota Supreme Court's interpretation of the CCSA and the usury statute renders those statutes unconstitutionally vague, and that retroactive application of this interpretation is unconstitutional.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine protects important constitutional principles such as fair warning, and a prohibition of arbitrary and discriminatory enforcement of laws. *Grayned*, 408 U.S. at 108-109. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and

discriminatory application." *Id.* "The degree of vagueness the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) *reh'g denied*, 456 U.S. 950 (1982). The Supreme Court has determined that economic regulation be subjected to a less strict vagueness test.

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Village of Hoffman, 455 U.S. at 498-499. The statutes at issue, the CCSA, RPAA and usury, are economic regulations. Although the usury laws provide for civil penalties, the law is nonetheless subject to a less stricter vagueness standard. Applying this standard, this Court finds that the holding in *Miller* does not render the statutes unconstitutionally vague.

Since 1981, the CCSA clearly and expressly encompasses certain terminable leases. A review of the terms of the rent-to-own contracts at issue herein establishes Defendants "leases" fall within the definition of "Sale of Goods" provided in the CCSA. Defendants were clearly

put on notice that its [sic] transactions were encompassed by the CCSA, and as such, subject to usury laws. This Court finds nothing vague in this statutory construction.

Defendants argument that *Miller* amended the usury statute by abolishing the elements of debt and absolute obligation to pay principal is meritless. *Miller* is consistent with usury law, which requires courts to look through the form to the substance of a transaction. As the *Miller* court found, rent-to-own customers *technically* do not incur debt or an absolute obligation to repay a principal amount – rent-to-own customers *for all practical purposes* are in the same legal position as ordinary buyers on credit.

Nor does the enactment of the RPAA contribute to Defendants' vagueness argument. The RPAA was not set up as an exclusive regulatory system of rent-to-own transactions, and the remedies provided therein are cumulative. *Miller,* 518 N.W.2d at 550. *See* Minn.Stat. §§ 325F.85 and 325F.97, Subd. 2.

Defendants also argue that retroactive application of the *Miller* decision violates due process because the *Miller* decision acts as an *ex post facto* law. The test developed by the United States Supreme Court for determining violations of the *ex post facto* clause derives from the principle that "central to the *ex post facto* clause prohibition is a concern for the 'lack of fair notice and governmental restraint when the legislation increases punishment beyond what was prescribed when the crime was consummated. [sic]" *Miller v. Florida,* 482 U.S. 423 (1987).

From this principle, the Court has determined that two elements must be met: the law must apply to events occurring before its enactment; and it must disadvantage the offender affected by it. *Miller*, 482 U.S. at 430. The Court has also held that there is no *ex post facto* violation if the law merely changes the modes of procedure that do not affect matters of substance. *Id.* (citation omitted). This principle has also been applied to judicial decisions as well. *Bouie v. City of Columbia* 378 U.S. 347, 353-354 (1964).

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s. 10 of the Constitution prohibits. . . . The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue' it must not be given retroactive effect.

Id.

This Court finds that the *Miller* decision is not a judicial construction that is unexpected and indefensible by reference to the CCSA, RPAA and the usury laws. *Miller* does not represent a change in the law and there have been no prior contrary rulings by the Minnesota Supreme Court. *See United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Generally, decisions construing statutes given full retroactive effect, except in a rare case where a court overrules its own construction of a statute.)

Based on the above, the Court finds no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law on the issue of whether the rent-to-own contracts are usurious as a matter of law.

2. RICO

Plaintiffs also seek a declaration from this Court that the predicate offense of "unlawful debt", under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(6)(b) is established as a matter of law.

Under RICO, unlawful debt is defined as:

> a debt . . . which was incurred in connection with the business of . . . lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961(6)(B). Plaintiffs argue that through its expert, they have established that in all its contracts, Defendants charged more than twice the usurious rate provided by Minn.Stat. § 334.01.

RICO is a remedial statute, and as such, must be liberally construed. *United States v. Mazzio*, 501 F.Supp. 340 (D.Pa.1980), *aff'd* 681 F.2d 810 (3rd Cir.), *cert denied* 457 U.S. 1134 (1982). In this case, this Court must look to Minnesota usury law to determine whether there is an "unlawful debt" for purposes of determining RICO liability. See *United States v. Biasucci*, 786 F.2d 504, 512 (2nd Cir.1986).

Given this Court's ruling that the rent-to-own contracts at issue are usurious as a matter of law, this Court must now also rule that predicate element of "unlawful

debt" is also established as a matter of law for purposes of RICO.

3. Measure of Damages for Usury Violation

Minn.Stat. § 334.02 provides that any person who has paid a usurious rate, may recover the full amount of interest so paid, with costs. Minn.Stat. § 334.03 provides that usurious contracts shall be deemed void, except to a holder in due course. It is Plaintiffs' position that Minnesota case law construing the remedies provisions of the usury statute provide that Plaintiffs are entitled alternative remedies: for those who wish to retain the goods received under the contract, the remedy is a refund of all interest paid; for those who wish to return the goods, voiding the contracts and a refund of all interest and principal paid.

Defendants argue that under *Rathbun, supra,* Plaintiffs are limited to interest only. Plaintiffs respond that *Rathbun* is not controlling.

In *Midland Loan Finance Co. v. Lorentz,* 209 Minn. 278, 287, 296 N.W. 911, 915 (1941), the court held that "one guilty of usurious extraction must bear the legal consequences flowing from such violation. As such he must lose not only the interest on the money risked, but also the principal, including as well all security given to secure such performance." In *Seebold v. Eustermann, supra,* the majority of the court determined that under a conditional sale found to be usurious, the contract is void. In determining the remedy available to the purchaser in usurious transaction involving a conditional sale, the court recognized that title remains with the seller until all

payments have been made. Thus, when such a contract is voided under usury, a purchaser is not entitled to possession of the good, because title had not passed until final payment had been made, leaving the purchaser with the single remedy of recovering the usurious interest paid. *Seebold*, 13 N.W. at 747.

Justice Loring, in his dissenting opinion in *Seebold*, expressed his concern as to the practical effect of the majority's holding – which would treat usurious contracts void as to both parties "whereas our holdings and the obvious purpose of the statute is to make it void as to the usurer only to impose penalties upon him alone." *Seebold*, at 747 (citing *Lukens v. Hazlett*, 37 Minn. 441, 35 N.W. 265 (1887); *Lorentz, supra.*)

In *Utterberg v. Cameron*, 282 N.W.2d 536 (Minn.1979), the court specifically overruled *Seebold*:

> *Seebold v. Eustermann*, . . . unless specifically overruled, would support the position of defendants that a contract in violation of Minn.Stat. § 334.03 is void at its inception and confers no rights upon either of the parties except as provided by statute. We now think the better reasoned result is expressed by the minority opinion of *Seebold*, based upon the premise that usury statutes are designed to protect the weak and necessitous so that the penalties should be imposed only against the usurer and not against the victim. . . . We accordingly overrule *Seebold v. Eustermann, supra*, the practical effect of which is to redirect the burdens and protections of the usury laws to prevent their invocation by the usurer at his option to avoid a contract, when, as in the instant case, a highly appreciable asset is its substance. The protection of asserting the

> defense of usury is available only to the purchaser.

Utterberg, 282 N.W.2d at 537.

As noted by Plaintiffs, *Rathbun* was decided five years before *Utterberg*, and the opinion cites no authority for its determination that Plaintiffs could be restricted to seeking only interest. Accordingly, the Court finds that under Minnesota law, the available remedies to Plaintiffs are voiding the contracts, and recovering all interest and principal paid, Minn.Stat. § 334.03, *Lorentz, supra*, or retain the property and refunding interest paid, Minn.Stat. § 334.02, *Utterberg, supra*.

The final dispute raised by the parties in this motion is the method to which the interest rate should be calculated. Defendants ask that the Court adopt the accounting method utilized in *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 93 N.W.2d 690, 697-98 (1958) and declare that a rate of $8 per $100 is equivalent to an effective rate of % 14.45, calculated pursuant to the actuarial method.

Plaintiffs object to the use of the add on method addressed in *Van Asperen*. Plaintiff [sic] ask the Court to declare the proper method of accounting is the U.S. Rule. Defendant's expert utilizes the same method of computing interest as did Plaintiff's expert. *See*, Weil Aff., page 11. Accordingly, the method utilized by the experts, which appears to the U.S. Rule, shall be utilized.

ORDER

Accordingly, based upon the above, and all files, records, and proceedings herein, IT IS HEREBY ORDERED AND DECLARED:

1. The rental purchase contracts issued by Defendant Thorn Americas, Inc. (formerly Rent-A-Center, Inc.) to the Plaintiff Class are consumer credit sales contracts for all purposes and are subject to the Minnesota General Usury Statute, Minn.Stat. § 334.01 *et seq.*

2. It is declared as to all Defendants that the contracts of the Plaintiff Class bear interest at effective rates in excess of twice the rate permitted under Minnesota law, and, thus, constitute an "unlawful debt" as defined by RICO, 18 U.S.C. § 1962(6).

3. The Plaintiff Class members, having made payments of principal, interest and fees to Thorn Americas, Inc. under usurious rental purchase agreements, shall have judgment against Thorn Americas, Inc. for an amount to be determined in the following manner:

A. All rental purchase contracts of the Plaintiff Class are hereby declared void *ab initio* as to Defendant Thorn Americas, Inc. pursuant to Minn.Stat. §§ 334.03 and 334.05. Defendant Thorn Americas, Inc. shall restore to the Plaintiff Class all payments made by the Plaintiff class under such contracts, including, but not limited to, all principal, interest, "early purchase option" payments and fees paid to Defendant under such contracts, together with interest thereon at the prejudgment interest rate.

B. Alternatively, any Class member may elect to seek a refund of interest only under any of

the Class member's contracts, together with interest thereon at the prejudgment interest rate, rather than recovering all amounts paid as stated in paragraph 3(A) above.

C. Within 60 days of the date of this Order, Thorn Americas, Inc. shall identify by make, model and serial number any and all goods identified in the contracts which it desires restored to it by members of the Plaintiff Class recovering sums on such contracts pursuant to paragraph 3(A) above. Failure to identify such goods within the 60 day time period shall constitute a waiver of any claim by Thorn Americas, Inc. to such goods.

D. Thorn Americas, Inc.'s security interest in goods held by class members is void and unenforceable, whether or not the final installment has been paid. As a result, Plaintiff Class members are relieved of all further obligations with regard to those contracts, including the obligation to make future payments under the contracts. From the date of this Order on, Thorn Americas, Inc. must cease making any further collections or receiving any further payments of any kind from the Plaintiff Class on the rental purchase agreements.

4. Within 60 days of the date of this Order, Thorn Americas, Inc. shall provide Plaintiffs' counsel with completed separate calculations of the total principal, interest and fees received by Thorn Americas, Inc. from Plaintiff Class members in connection with contracts executed on or after August 1, 1990. Reasonable supporting documentation shall be provided with such calculations verifying the methodology of calculations and the accuracy of figures used. The "cost of lease services" in each contract

shall be deemed interest for the purpose of such calculation. Payments on contracts shall be calculated as amortizing principal and paying interest under the "United States Rule" or actuarial method whereby payments are applied first to interest earned and the remainder to reduction of principal. Plaintiffs' counsel and their accounting consultants are entitled to do such testing, sampling of data, and review of such methodology and calculations as may be necessary to verify Defendant's calculations, and Thorn Americas, Inc. is directed to cooperate and provide Plaintiffs access to any such data or information.

5. Within 30 days of the date of this Order, Thorn Americas, Inc. shall provide Plaintiffs' counsel with a list of the names and last known addresses of each class member. Such list will state the date of each contract entered into by each such class member during the relevant period, identify the property involved in each such contract, state the amount of payments made toward principal, interest and other charges on each such contract, and state whether or not said contract was terminated through return of the property or otherwise.

6. Within 30 days of receiving the list of class members described in paragraph 5 above, Plaintiffs' counsel shall submit to this court for approval a proposed notice to class members informing them of the contents of the Court's ruling in paragraphs 1 through 3 above and their rights thereunder. Within 30 days after the Court approves such notice to class members, the Defendants shall complete the distribution of said notice by first class mail to members of the class, and submit proof of the distribution of such notice to the Court and Plaintiffs'

counsel. The cost of preparing and delivering said notice shall be borne by the Defendants.

7. Within 60 days of the date of mailing of the notice described above, members of the Plaintiff Class, who have not already returned the property identified in any of their contracts, shall inform the Court through class counsel of their desire to elect relief under either paragraph 3(A) or 3(B) above. Any such class member who fails to receive notice to elect or fails to respond within said time period shall be deemed to have elected a remedy under paragraph 3(A) above.

8. Plaintiffs' counsel shall have 60 days from receipt of the Defendant's calculation under paragraph 4. above to file with the Court any exceptions taken with such calculation. If no exceptions are taken, the Defendant's calculations shall be filed with the Court along with a proposed order for judgment. In the event the calculation is contested, the Court will appoint a Special Master to adjudicate such contest. If the Defendant's calculation is found to be more than 10% inaccurate, they shall pay the costs of the Special Master. If the error is less than 10%, the Plaintiffs shall pay the cost of the Master.

9. Within 90 days of the date of mailing the notice described in paragraph 6 above, Plaintiffs' counsel shall report to the court concerning the amount of principal, interest and other charges paid by class members on relevant contracts, the remedies elected by various class members, and the total amount of damages recoverable in accordance therewith. Thereafter, the Court will enter an appropriate award of damages against Thorn Americas, Inc. in accordance with such procedures as the Court may

hereafter adopt. Such award shall include prejudgment interest at the statutory rate from the date of filing of the Complaint, December 4, 1991.

10. From the date of this Order on, Thorn Americas, Inc. is enjoined from entering into credit sales transactions within the State of Minnesota which bear interest at annual rates in excess of the maximum rate permitted under Minnesota law.

11. The partial judgment when reduced to sums certain as prescribed herein shall be rendered final under Rule 54(b), Federal Rules of Civil Procedure, unless Thorn Americas, Inc. posts a bond or other suitable security with the Court equal to such judgments.

12. The Court will consider the matter of attorneys fees, costs, plan of distribution and class notices at the time the calculations of damages are submitted.

Dated: September 28, 1995.

/s/ Michael J. Davis
Michael J. Davis
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3694MNST

Vickie Fogie, et al.,	*	
	*	Order Denying
Appellees,	*	Petition for Rehearing
	*	and Suggestion for
v.	*	Rehearing En Banc
	*	
THORN Americas, Inc., etc., et al.,	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. Judge Bowman would grant the suggestion.

The petition for rehearing by the panel is also denied.

November 4, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

Vickie FOGIE and Joan Leonard, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

RENT-A-CENTER, INC., a Kansas Corporation, et al., Defendants.

No. C4-93-1801.

Supreme Court of Minnesota.

June 24, 1994.

Certified question of law from United States District Court; Diana Murphy, Judge.

David L. Ramp, Legal Aid Soc. of Mpls., Inc., Seymour J. Mansfield, Richard J. Fuller, Mansfield & Tannick, P.A., Mark N. Stageberg, Kay Nord Hunt, Lommen, Nelson, Cole & Stageberg, P.A., and Timothy L. Thompson, Minneapolis, for plaintiffs.

John Troyer, J. Patrick McDavitt, Briggs and Morgan, Minneapolis, and John C. Dods, Peter E. Strand, Shannon Spangler, Shook, Hardy & Bacon, Kansas City, MO, for defendants.

Elmer B. Trousdale, Christopher M. Scotti, Oppenheimer, Wolff & Donnelly, St. Paul, for amicus curiae, Minnesota Retail Merchants Ass'n.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The following questions were certified to this court from federal district court pursuant to Minn.Stat. § 480.061 (1992): (1) Are rent-to-own contracts consumer credit sales under Minn.Stat. § 325G.15 (1992)? (2) Does the usury statute, Minn.Stat. § 334.01 (1992), apply to rent-to-own contracts? For the reasons set forth in *Miller v. Colortyme, Inc.*, 518 N.W.2d 544 (Minn., 1994), we answer both questions in the affirmative.

Delilah MILLER, et al., Petitioners, Appellants,

v.

COLORTYME, INC., et al., Respondents.

No. C2-92-2595.

Supreme Court of Minnesota.

June 24, 1994.

Petition for Clarification Denied Aug. 2, 1994.

Customers who entered rent-to-own contracts for consumer goods sued lessors to recover for violation of Consumer Credit Sales Act (CCSA) and usury laws. The District Court, Hennepin County, entered partial summary judgment for customers. Lessors appealed. The Court of Appeals, 504 N.W.2d 258, reversed. Customers

appealed. The Supreme Court, Tomljanovich, J., held that: (1) "rent-to-own" transactions are consumer credit sales under CCSA, and (2) such transactions are subject to interest rate limitations of general usury statute.

Court of Appeals' decision reversed and remanded.

Seymour J. Mansfield, Richard J. Fuller, Mansfield & Tanick, P.A., Mark N. Stageberg, Kay Nord Hunt, Lommen, Nelson, Cole & Stageberg, P.C., and David Ramp, Legal Aid Soc. of Minneapolis, Minneapolis, for appellants.

Jay M. Quam and Sue Halverson, Fredrikson & Byron, Minneapolis, for respondents.

Robert Hobbs, National Consumer Law Center, Inc., Boston, MA, William Crowder and Susan Bedor, Crowder & Bedor, St. Paul, for amicus curiae Nat. Consumer Law Center, Inc.

Elmer B. Trousdale and Christopher M. Scotti, Oppenheimer, Wolff & Donnelly, St. Paul, for amicus curiae Minnesota Retail Merchants Ass'n.

James E. Rolshouse, Minneapolis, for amicus curiae Minnesota Ass'n of Rental Dealers.

Jarvis C. Jones, Minneapolis, for amici curiae N.A.A.C.P., the Urban Coalition of Minneapolis, the Minneapolis Urban League, Matthew Little and Gleason Glover.

H. Theodore Grindal and Joseph Musliek, Opperman, Heins & Paquin, Minneapolis, for amicus curiae Ass'n of Progressive Rental Organizations.

David Woodward, St. Paul, for amicus curiae Atty. Gen., State of Minn.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

We are asked to decide whether "rent-to-own" transactions (also known as "rental-purchase" transactions) are consumer credit sales under the Consumer Credit Sales Act, Minn.Stat. §§ 325G.15 and 325G.16 (1992), and if they are consumer credit sales, whether they are subject to the interest rate limitations of the general usury statute, Minn.Stat. § 334.01 (1992). The court of appeals held that rent-to-own agreements entered into by respondents are not consumer credit sales and are not usurious. We reverse and remand.

Respondent D.E.F. Investments, Inc. and its subsidiaries operate several rent-to-own dealerships in Minnesota. They do business under the trade name "Renter's Choice Home Furnishings." DEF uses standard form contracts to lease new and used furniture, televisions, appliances, and various other consumer goods to customers. Under these contracts, which are similar to others used in the rent-to-own industry, customers elect to rent items for a weekly or monthly rental term. At the end of each term, customers have a unilateral option to renew the agreement for another term. If a customer renews an agreement for a specified number of terms, the customer obtains title and ownership of the item rented for no additional consideration. Full payment of the rental fee

must be made before or at the beginning of each term. In order to acquire ownership of an item, consumers ordinarily must pay a total price far in excess of fair market value. DEF does not offer consumer items for immediate sale.

Appellants Delilah Miller and Craig Stenzel both have entered into rent-to-own contracts with DEF over a period of several years. For example, on December 18, 1990, Miller entered into a rent-to-own transaction with DEF for a used washer and dryer, the stated cash price of which was $800.75. Under the contract, Miller could acquire ownership of the washer and dryer by making 16 monthly payments of $84.40, for a total of $1,350.40, or by making 69 weekly payments of $21.10, for a total of $1,455.90. As a further example, on October 17, 1990 Stenzel entered into a rent-to-own transaction with DEF for a 19" color television, the stated cash price of which was $470. Under the contract, Stenzel could acquire ownership of the television by making 18 monthly payments of $47.70, for a total of $858.60, or by making 78 weekly payments of $12.75, for a total of $994.50. Some of the contracts Miller and Stenzel have entered into have resulted in completed purchases; others have not.

On April 7, 1992 appellants Stenzel and Miller filed a class action lawsuit against DEF seeking monetary damages as well as declaratory and injunctive relief. In the relevant counts of appellants' complaint, appellants allege that DEF has violated various consumer protection statutes by failing to treat rent-to-own transactions as credit sales under the Consumer Credit Sales Act, and that DEF has engaged in usury in violation of Minn.Stat. § 334.01. On August 3, 1992, appellants moved for partial

summary judgment, asking for a declaratory judgment that respondents' contracts constitute credit sales. On August 5, 1992, DEF moved for partial summary judgment, seeking dismissal of appellants' usury claim.

On November 30, 1992, the district court filed an order which granted appellants' motion for summary judgment and declared contracts entered by "Class One"[1] to be "consumer credit sales for all purposes within the meaning of Minn.Stat. § 325G.15 and 325G.16." The court also denied DEF's motion for summary judgment and instead granted summary judgment for appellants on their usury claim, reserving the measure of damages for the fact finder.

After granting discretionary review, the court of appeals issued an opinion on August 3, 1993, reversing the district court. *Miller v. Colortyme, Inc.*, 504 N.W.2d 258 (Minn.App.1993). The court of appeals held: (1) DEF's rent-to-own agreements are not "consumer credit sales" for all purposes within the meaning of Minn.Stat. §§ 325G.15 and 325G.16, and (2) DEF's agreements are not usurious under Minn.Stat. § 334.01. While not reaching the issue, the court of appeals further suggested that the Rental Purchase Agreements Act (RPAA), Minn.Stat. §§ 325F.84-.98, is in substantial conflict with the Consumer Credit Sales Act (CCSA), Minn.Stat. §§ 325G.15

---

[1] The November 30 order grants appellants' motion for class certification as to Class One. Class One consists of individuals who entered rent-to-own contracts after April 7, 1986 that provide for ownership at the end of a predesignated term without requiring an additional balloon payment.

and 325G.16, and that the provisions of the RPAA are controlling. This appeal followed.

I.

We consider first whether the CCSA defines rent-to-own agreements as consumer credit sales, thereby departing from the common law distinction between leases and sales in order to provide the same protections to consumers who engage in rent-to-own transactions as to consumers who engage in traditional credit sales. At common law a rent-to-own transaction is regarded as a lease and not a sale because a buyer is not bound to pay the total purchase price and can terminate a transaction at any time by returning the property. *See* Samuel Williston, *The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act*, § 336 (1948). Prior to enactment of the CCSA this court followed the common law distinction. *Hughes v. Becker*, 260 Minn. 83, 87, 108 N.W.2d 781, 783 (1961).

The CCSA was originally enacted in 1971. In 1981 the legislature amended Minn.Stat. § 325G.15, subd. 5 of the CCSA to define certain terminable leases as a "sale of goods." Act of March 27, 1981, ch. 10, § 1, 1981 Minn.Laws 18-19. Under the amended version of Minn.Stat. § 325G.15, subd. 5, the term "sale of goods" includes:

> a contract in the form of a terminable bailment or lease of goods if: (a) the bailee or lessee has the option to renew the contract by making the payments specified in the contract; (b) the contract obligates the bailor or lessor to transfer ownership of the property to the bailee or lessee

BEST AVAILABLE COPY

> for no other or a nominal consideration upon full compliance by the bailee or lessee with the bailee's or lessee's obligations under the contract including any obligation incurred by reason of the exercise of an option by the bailee or lessee to renew the contract; and (c) the payments contracted for by the bailee or lessee, including those payments pursuant to the exercise of an option by the bailee or lessee to renew the contract, are substantially equivalent to or in excess of the aggregate value of the property and services involved.

It is undisputed that DEF's contracts satisfy each of the above criteria and therefore constitute a "sale of goods" within the meaning of Minn.Stat. § 325G.15, subd. 5. First, under DEF's contracts the lessee has the option to renew the contract by making advance rental payments at the beginning of each rental term. Second, the contracts obligate DEF to transfer ownership to the consumer if the consumer renews the agreement for a specified number of payments. Third, the total payments necessary to acquire ownership exceed the value of the property and services provided by respondents.

Given that rent-to-own contracts are "sales of goods" within the meaning of Minn.Stat. § 325G.15, subd. 5, the question is whether they are protected "consumer credit sales" within the meaning of Minn.Stat. § 325G.15, subd. 2. Under Minn.Stat. § 325G.15, subd. 2, a "consumer credit sale" is defined as:

> [A] sale of goods or services in which (a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind; (b) the buyer is a natural person; and (c) the goods

> or services are purchased primarily for a personal, family or household purpose, and not for commercial, agricultural, or business purpose.

The court of appeals concluded that DEF's rent-to-own transactions are not protected "consumer credit sales." It reasoned that DEF does not grant credit to customers because customers prepay for use of leased goods with no further obligation. *Miller v. Colortyme*, 504 N.W.2d at 260.

We believe rent-to-own transactions are "consumer credit sales" within the meaning of Minn.Stat. § 325G.15, subd. 2. The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. By defining certain terminable leases as "sales" within the CCSA, the legislature has made clear its intent to subject these terminable leases to the same consumer protection laws as ordinary credit sales. There is no conceivable reason why the legislature would amend Minn.Stat. § 325G.15, subd. 5 to define certain terminable leases as sales if it did not intend such leases to be protected "consumer credit sales" within the meaning of Minn.Stat. § 325G.15, subd. 2. The interpretation of the CCSA adopted by the court of appeals renders meaningless the language in Minn.Stat. § 325G.15, subd 5 defining certain terminable leases as sales.

DEF argues that a seller cannot be deemed to have extended "credit" in the absence of a buyer who has incurred debt. The word "credit" can have different meanings in different statutes and we do not believe it is appropriate to apply a narrow definition of credit in this context. The manifest purpose of the Consumer Credit Sales Act is consumer protection. As a remedial statute, it

is entitled to a liberal construction to promote, not frustrate, its objectives. *Governmental Research Bureau v. Borgen*, 224 Minn. 313, 28 N.W.2d 760 (1947). The legislature has specifically defined the transactions at issue as sales, despite their terminable nature. Sales are ordinarily regarded as "credit sales" where a buyer acquires possession but is allowed to defer full payment. *See* Black's Law Dictionary 369-70 (6th Ed.1990). Accordingly, we hold that rent-to-own transactions are credit sales within the meaning of Minn.Stat. § 325G.15, subd. 2 because buyers of goods are not required to make full payment upon acquiring possession but are allowed to pay for goods sold over time.[2]

II.

Minn.Stat. § 325G.16, subd. 4 provides that "[a]ny lease or bailment of goods which constitutes a consumer credit sale shall be deemed to be a sale for all purposes." Because rent-to-own agreements are consumer credit sales for all purposes, they are subject to the same consumer protection laws as ordinary credit sales, including

---

[2] By defining rent-to-own transactions as "sales," the legislature recognized that the economic reality of these transactions is like that of ordinary credit sales, despite their terminable nature. As the consumer of a rent-to-own product continues making weekly or monthly payments under the contract, the pressure to keep making payments and to exercise the purchase option grows until it becomes the only feasible rational choice, given the alternative of completely forfeiting all past payments and returning the goods.

the general usury statute, Minn.Stat. § 334.01.[3] We must decide whether the district court erred in holding that respondents' contracts are usurious as a matter of law and granting summary judgment for appellants.[4]

We have held that four elements must be proven to establish a violation of the usury law:

(1) a loan of money or forbearance of debt,

(2) an agreement between the parties that the principal shall be repayable absolutely,

(3) the exaction of a greater amount of interest or profit than is allowed by law, and

(4) the presence of an intention to evade the law at the inception of the transaction.

---

[3] The usury statute provides, in relevant part:

> The interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year.

[4] There are several statutory exceptions to the general usury statute applying to specific types of credit transactions, but none of these exceptions are applicable to the rent-to-own agreements at issue. The rent-to-own contracts at issue also are not exempt from the usury statute under the judicially created time-price doctrine. This doctrine may apply where a seller fixes one price for cash and another price for credit. Respondents do not offer consumer items for immediate sale.

Citizen's Nat'l Bank of Willmar v. Taylor, 368 N.W.2d 913, 918 (Minn.1985).[5]

DEF argues that its rent-to-own contracts are not usurious because they do not involve a forbearance of debt and do not impose an absolute obligation to repay a principal amount. In usury law, the term "forbearance" signifies the "contractual obligation of a lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to pay a loan or debt then due and payable." *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 233, 219 N.W.2d 641, 648 (1974). We agree with DEF that rent-to-own consumers technically do not incur any debt because they pay in advance for each rental period and are never obligated to renew an agreement. We also agree with DEF that a rent-to-own consumer technically has no absolute obligation to repay a principal amount. We disagree, however, that the first two common law elements of usury can be applied here to defeat appellants' usury claim where the legislature has defined rent-to-own transactions as "consumer credit sales" for all purposes.

The purpose of the usury law is to protect consumers by limiting the amount of interest which can be charged on a credit sale or loan. The first two common law elements of usury serve merely to clarify what transactions

---

[5] Minn.Stat. § 334.011, subd. 2 (1992) provides that if a greater rate of interest than that allowed is charged then the entire interest due on that note, bill or other evidence of debt is forfeited. In addition, if the greater rate of interest has been paid, the person who paid it may recover in a civil action an amount equal to twice the amount of interest paid.

are subject to interest rate limitations. By defining rent-to-own transactions in the CCSA as "consumer credit sales" for all purposes, the legislature has established that consumers who enter into rent-to-own transactions are to benefit from the same protections as consumers who purchase goods through ordinary installment sales, even though rent-to-own consumers do not actually incur any debt and do not have any obligation to repay a principal amount. Consequently, the first two common law elements of usury are met by operation of statute.

The legislature's decision to treat rent-to-own transactions as credit sales recognizes that although these transactions purport to be short-term leases, they operate in substance much like ordinary installment sales. Consumers who purchase goods through rent-to-own agreements may not incur debt, but they still implicitly pay interest in return for the ability to pay for goods over time. Moreover, rent-to-own customers may not have an absolute obligation to repay a principal amount, but their situation is analogous to that of ordinary buyers on credit in that they must either forfeit possession of a good or continue paying for it. *See supra*, note 2.

In addressing the scope of the usury statute, we look through the form to the substance of a transaction. *Rathbun*, 300 Minn. at 235, 219 N.W.2d at 649.[6] "There is no

---

[6] In *Rathbun*, defendant offered for sale retail installment credit coupon books. A customer could purchase on credit a book of coupons in denominations ranging from 50 cents to $10, and totalling from $10 to $200, which could be used towards a purchase of merchandise at defendant's stores. For coupon books sold after January 1, 1971 finance charges accrued after

shift or device on the part of the lender to evade the [usury] law under or behind which the law will not look to ascertain the real nature and object of the transaction." *Adjustment Service Bureau, Inc. v. Buelow*, 196 Minn. 563, 567, 265 N.W. 659, 661 (1936).

Having determined that the first two elements of the common law usury test are met by operation of statute, we turn to whether the district court was correct in determining that respondents intentionally charged an excessive amount of interest. Under Minn.Stat. § 334.01, the interest for any legal indebtedness generally shall be no greater than six percent.[7] DEF acknowledges the large disparity between the cost of purchasing goods through its rent-to-own agreements and the value of the goods sold, but alleges that there is a factual issue with respect to whether it charged excessive interest, because the total value of goods and services (e.g., free delivery and maintenance) provided by DEF is disputed. We disagree. While there is some question as to the total value of services provided by DEF, DEF offered virtually no evidence to the district court as to the value of such services. Based on the record, we agree with the district court that

---

the first coupon was actually used, and all coupons could be returned at any time without charge. A customer who returned unused coupons was given full credit, including credit for finance charges attributable to the unused coupons. Even though the customer could return the coupons unused for full credit, the court held that the contracts were usurious.

[7] Section 334.01 permits an interest rate of eight percent if the rate is contracted for in writing.

no reasonable fact finder could conclude that the difference between the total payments required under the contracts and the value of the goods and services extended amounts to as little as six percent of the total payments. The district court properly concluded that DEF charged an excessive amount of interest as a matter of law.

DEF also argues that it did not have the requisite intent necessary to satisfy a usury claim because it acted in good faith and did not intend to violate the law. To be guilty of violating the usury law, a lender need only intend to charge a rate that is in fact usurious. It matters not whether the lender knows he is violating the usury law. *Citizen's Nat'l Bank of Willmar v. Taylor*, 368 N.W.2d at 919. DEF does not claim that it intended to collect less money than is stated on the contracts, and therefore, as a matter of law DEF had the requisite intent.

Because no genuine issue of material fact exists as to whether DEF intentionally charged an excessive rate of interest, the district court properly granted summary judgment for appellants on their usury claim.

III.

We finally consider DEF's argument that the Rental Purchase Agreement Act, Minn.Stat. §§ 325F.84-.98, has repealed the Consumer Credit Sales Act. The RPAA was enacted in 1990 and provides a number of protections to rent-to-own consumers. Among these, the RPAA provides for specified disclosures in the rent-to-own agreement, in advertising, and on in-store merchandise tags (sections 325F.86-.88); imposes restrictions and protections in the

event of default (section 325F.89); provides for reinstatement rights to consumers (section 325F.90); limits delivery charges, security deposits and collection fees (section 325F.91); authorizes the commissioner of commerce to adopt rules governing cash price limits (section 325.91); prohibits identified abusive debt collection practices (section 325F.92); and provides for enforcement through both the Attorney General and a private right of action (section 325F.97).

The RPAA on its face does not purport to set up an exclusive system regulating rent-to-own contracts. Section 325F.85 of the RPAA specifically addresses the relationship between the RPAA and the CCSA, and provides:

> If the consumer protection provisions of sections 325F.84 to 325F.97 conflict with sections 325G.15 and 325G.16, sections 325F.84 to 325F.97 apply to a rental-purchase agreement and supersede sections 325G.15 and 325G.16.

Moreover, section 325F.97, subd. 2 of the RPAA provides that the remedies under the RPAA "are cumulative and shall not be construed as restricting any remedy that is otherwise available."

The RPAA's legislative history further indicates that the RPAA was not intended to repeal the CCSA. As originally proposed, the RPAA would have explicitly excluded applicability of the CCSA. Amendments, however, were subsequently adopted which deleted the provisions repealing the CCSA and which substituted the present language of section 325F.85.

Despite this statutory language and legislative history, DEF suggests that the RPAA impliedly repeals the

CCSA. Under Minn.Stat. § 645.39 (1992), where a later law does not purport to establish an exclusive system covering an subject matter, a later law shall only be construed as impliedly repealing earlier laws on the same subject where the two laws are irreconcilable. A statute is to be construed, whenever reasonably possible, in such a way as to avoid irreconcilable differences and conflict with another statute. *Erickson v. Sunset Memorial Park Assoc.*, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961).

DEF points to a number of differences and conflicts between the CCSA and the RPAA, but none of these are irreconcilable. First, DEF notes that although the RPAA imposes express limitations on charges for certain items in rent-to-own agreements (e.g., delivery fees, security deposit, penalty for early termination), it does not impose an express limitation on the total amount that customers can be charged. DEF additionally notes that although the RPAA requires disclosure of the difference between the "cash price" and the amount of total payments, using the term "cost of lease services," it does not impose any express limitation on what may be charged for lease services. However, the fact that the RPAA fails to impose any caps on total payments or on interest rates does not create an irreconcilable conflict with the CCSA because the consumer protections provided by the two statutes can be treated as cumulative.

Next, DEF argues that if the legislature intended rent-to-own transactions to be "credit sales" for all purposes, it would not have enacted a statute regulating such transactions which is replete with lease terminology. For example, in the RPAA, the person who rents personal property under a rent-to-own agreement is defined as the

"lessee," and the person who offers property for rent is defined as the "lessor." Minn.Stat. § 325F.84. However, use of terms such as "lessee" and "lessor" in and of itself does not create an irreconcilable conflict with the CCSA. The CCSA itself uses terms like "lessor" and "lessee" to describe rent-to-own transactions, only to further define these kinds of transactions as "sales of goods." See Minn.Stat. § 325G.15, subd. 5.

DEF also points out that among the disclosures required by the RPAA, a customer must be told that she will not own the property until she has made the total payments necessary to acquire ownership of the property. Minn.Stat. § 325F.86(e). DEF argues that this provision conflicts with 325G.16, subd. 4 of the CCSA, which requires the lessor's interest to be treated as a "security interest." The disclosure requirement in the RPAA, however, is for the protection of the consumer and merely serves to ensure the consumer is made aware that *absolute* ownership will not pass prior to full payment.

DEF finally claims that the two statutes cannot be reasonably reconciled because, if the CCSA is deemed to impose an interest rate cap, this cap combined with the early-purchase option required by the RPAA would force defendants to sell their goods at below market value.[8] Appellants, however, cite a number of ways in which

---

[8] Under the early-purchase option requirement, lessors must allow customers to acquire ownership of a property any time after the first periodic payment is made by tendering 55% of the difference between the total of scheduled payments and the total amount paid on the account. Minn.Stat. § 325F.93 (1992).

respondents can manipulate the contract terms to realize profits even if the early purchase option is exercised (e.g. by increasing the length of the initial rental period, requiring an initial downpayment, decreasing the number of payments necessary to acquire ownership), and in any event, lost profits is not a valid defense to a usury claim.

We conclude that the RPAA does not repeal the CCSA; rather the remedies in the two statutes are cumulative. We reverse and remand to the district court for further proceedings.

APPENDIX E

MINNESOTA STATUTES

RENTAL PURCHASE AGREEMENTS

325F.84 DEFINITIONS.

Subdivision 1. **Applicability.** As used in sections 325F.84 to 325F.98, the following terms have the meanings given them.

Subd. 2. **Advertisement.** "Advertisement" means a commercial message in any medium, including signs, window displays, and price tags, that promotes, directly or indirectly, a rental-purchase agreement.

Subd. 3. **Cash price.** "Cash price" means an amount equal to the equivalent fair market value for goods offered under a consumer credit sale as provided under section 325G.15.

Subd. 4. **Consummation.** "Consummation" means the time at which the lessee enters into a rental-purchase agreement.

Subd. 5. **Lessee.** "Lessee" means a natural person who rents personal property under a rental-purchase agreement for personal, family, or household use.

Subd. 6. **Lessor.** "Lessor" means a person who, in the ordinary course of business, regularly leases, offers to lease, or arranges for the leasing of property under a rental-purchase agreement.

Subd. 7. **Personal property.** "Personal property" means property that is not real property under the laws of this state when it is made available for a rental-purchase agreement.

Subd. 8. **Rental-purchase agreement.** "Rental-purchase agreement" means an agreement for the use of personal property in which all of the following apply:

(1) the lessor is regularly engaged in the rental-purchase business;

(2) the agreement is for an initial period of four months or less, whether or not there is any obligation beyond the initial period, that is automatically renewable with each payment and that permits the lessee to become the owner of the property;

(3) the lessee is a person other than an organization; and

(4) the lessee takes under the rental-purchase agreement primarily for a personal, family, or household purpose.

325F.85 APPLICATION OF OTHER LAW.

If the consumer protection provisions of sections 325F.84 to 325F.97 conflict with sections 325G.15 and 325G.16, sections 325F.84 to 325F.97 apply to a rental-purchase agreement and supersede sections 325G.15 and 325G.16.

325F.86 DISCLOSURES.

In a rental-purchase agreement, the lessor shall disclose the following items, as applicable:

(a) The total of payments necessary to acquire ownership of the property accompanied by an explanation

that this term means the "total dollar amount of payments you will have to make to acquire ownership."

(b) The total number, amounts, and timing of all payments and other charges including taxes or official fees paid to or through the lessor that are necessary to acquire ownership of the property.

(c) The difference between the amount disclosed under paragraph (a) and the cash price of the leased property, using the term "cost of lease services" to mean the difference between these amounts.

(d) Any initial or advance payment such as a delivery charge or trade-in allowance.

(e) A statement that the lessee will not own the property until the lessee has made the total of payments necessary to acquire ownership of the property.

(f) A statement that the total of payments does not include additional charges such as late payment charges, and a separate listing and explanation of these charges, as applicable.

(g) A statement that the lessee is liable for loss or damage to the property and the maximum amount for which the lessee is liable, which in the case of loss shall in no event be greater than the price the lessee would have paid to exercise an early purchase option. In the case of damage to the property other than normal wear and tear, the lessee shall be liable for the lesser of the price the lessee would have paid to exercise an early purchase option or the cost of repair as reasonably determined by the lessor.

(h) A statement that the lessee is not required to purchase a liability damage waiver from the lessor.

(i) A description of the goods or merchandise including model numbers as applicable and a statement indicating whether the property is new or used. It is not a violation of this subdivision to indicate that the property is used if it is actually new.

(j) A statement that the lessee has the option to purchase the leased property during the terms of the rental-purchase agreement and at what price, formula, or by what method the price is to be determined.

(k) The cash price of the merchandise.

(l) A statement of the following lessee rights: reinstatement rights under section 325F.90, default notice under section 325F.89, and consumer warranties under sections 325G.17 to 325G.20.

The commissioner of commerce may prescribe the disclosure form by rule.

325F.87 FORM REQUIREMENTS.

Subdivision 1. **Generally.** The disclosure information required by section 325F.86 must be disclosed in a rental-purchase agreement and:

(1) must be made clearly and conspicuously with items appearing in logical order and segregated as appropriate for readability and clarity;

(2) must be made in writing;

(3) need not be contained in a single writing or made in the order set forth in section 325F.86; and

(4) may be supplemented by additional information or explanations supplied by the lessor, but none shall be stated, used, or placed so as to mislead or confuse the lessee or to contradict, obscure, or detract attention from the information required by section 325F.86, and so long as the additional information or explanations do not have the effect of circumventing, evading, or unduly complicating the information required to be disclosed by section 325F.86.

Subd. 2. **Timing.** The lessor shall disclose all information required by section 325F.86 before the rental-purchase agreement is executed. These disclosures must be made on the face of the writing evidencing the rental-purchase agreement.

Subd. 3. **Copy to lessee.** Before any payment is due, the lessor shall furnish the lessee with an exact copy of each rental-purchase agreement. The agreement shall be signed by the lessee and is evidence of the lessee's agreement. If there is more than one lessee in a rental-purchase agreement, delivery of a copy of the rental-purchase agreement to one of the lessees constitutes compliance with this subdivision; however, a lessee not signing the agreement is not liable under it.

Subd. 4. **Type size.** The terms of the rental-purchase agreement, except as otherwise provided in this section, must be set forth in not less than eight-point standard type.

Subd. 5. **Blank spaces.** All blank spaces on the rental-purchase agreement form must be filled in before the rental-purchase agreement is executed. Blank spaces that are provided for items or terms not applicable to the agreement must be crossed out.

325F.88 ADVERTISING.

Subdivision 1. **Prohibition.** An advertisement for a rental-purchase agreement shall not state or imply that a specific item is available at specific amounts or terms unless the lessor usually and customarily offers or will offer that item at those amounts or terms.

Subd. 2. **Disclosures.** (a) If an advertisement for a rental-purchase agreement refers to or states the amount of any payment or the right to acquire ownership for a specific item, the advertisement must also clearly and conspicisouly state the following terms, as applicable:

(1) that the transaction advertised is a rental-purchase agreement;

(2) the total of payments necessary to acquire ownership; and

(3) that the lessee will not own the property until the total amount necessary to acquire ownership is paid in full or by prepayment as provided for by law.

(b) Every item displayed or offered under a rental-purchase agreement shall have clearly and conspicuously indicated in Arabic numerals, so as to be readable and understandable by visual inspection, each of the following affixed to the item:

(1) the cash price of the item; and

(2) the amount of the lease payment and the total of lease payments required for ownership.

Subd. 3. **Nonapplication.** This section does not apply to the owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

325F.89 DEFAULT.

Subdivision 1. **Enforceability.** An agreement of the parties to a rental-purchase agreement with respect to default is enforceable only to the extent that one of the following apply:

(1) the lessee both fails to renew an agreement and also fails to return the property or make arrangements for its return as provided in the agreement; or

(2) the prospect of payment, performance, or return of the property is materially impaired due to a breach of the rental-purchase agreement, with the burden of establishing the prospect of material impairment on the lessor.

Subd. 2. **Authorization.** If a lessee has been in default for three business days, the lessor may give the lessee a default notice and request surrender of the property as provided under subdivision 3. Mailing written notice to the last known address of the lessee meets the requirement of giving written notice under subdivision 3.

Subd. 3. **Default notice.** The first default notice and a subsequent default notice that is sent more than 12

months after sending the last written notice must be in writing and conspicuously state the following:

(1) the name, address, and telephone number of the lessor to whom payment is to be made;

(2) a brief identification of the transaction;

(3) the lessee's right to cure the default;

(4) the amount of payment and date by which payment must be made to cure the default;

(5) a statement of the lessee's reinstatement rights as provided under section 325F.90; and

(6) a request to voluntarily surrender the property if the payment is not made.

A subsequent default notice given within the 12 months after a written default notice may be given orally and constitutes proper notice under this section.

Subd. 4. **Property recovery.** A lessor may not bring a court action to recover the property until seven days after a proper default notice has been given.

Subd. 5. **Voluntary surrender of property.** This section does not prohibit a lessee from voluntarily surrendering possession of the property or the lessor from enforcing a past due obligation which the lessee may have at any time after default.

Subd. 6. **Compliance.** If the lessee cures the default by taking the action required in the default notice, a breach of the agreement is considered as not having occurred.

325F.90 LESSEE'S REINSTATEMENT RIGHTS.

Subdivision 1. **Generally.** A lessee who fails to make timely lease payments may reinstate the original rental-purchase agreement without losing any rights or options previously acquired under the rental-purchase agreement if both of the following apply:

(1) after having failed to make a timely payment, the lessee has surrendered the property to the lessor within seven days of a request to surrender the property made by the lessor as provided in section 325F.89; and

(2) in the case of a lessee that has paid less than 60 percent of the total of payments necessary to acquire ownership of the property, not more than 60 days have passed since the lessee returned the property. If the lessee has paid more than 60 percent of the total of payments necessary to acquire ownership of the property, the lessee's rights to reinstate shall be extended for a period of not less than 180 days after the lessee has returned the property.

Subd. 2. **Charges.** As a condition to reinstating a rental-purchase agreement, a lessor may charge the outstanding balance of any accrued payments; a reinstatement fee not to exceed $5 for each reinstatement; and a delivery charge not to exceed $15 for five items or less or $30 for more than five items, if redelivery of the item is necessary.

Subd. 3. **Substitute items.** If reinstatement occurs as provided in this section, the lessor shall provide the lessee with the same item, if available, leased by the

lessee before reinstatement. If the same item is not available, a substitute item of comparable worth, quality, and condition may be used. If a substitute item is provided, the lessor shall provide the lessee with all the information required by section 325F.86.

235F.91 PROHIBITED PRACTICES.

Subdivision 1. **Prohibited rental agreement provisions.** A rental-purchase agreement may not contain a provision:

(1) requiring a confession of judgment;

(2) authorizing a lessor or an agent of the lessor to commit a breach of the peace in the repossession of property;

(3) waiving a defense, counterclaim, or right the lessee may have against the lessor or an agent of the lessor;

(4) requiring the payment of a late charge unless a lease payment is delinquent for more than two business days for a weekly lease or three business days for a monthly lease, and the charge or fee shall not be in an amount more than the greater of five percent of the delinquent lease payment or $3;

(5) requiring a separate payment in addition to lease payments in order to acquire ownership of the property, other than by exercising an early purchase option pursuant to section 325F.93; and

(6) authorizing a lessor to charge a penalty for early termination of a rental-purchase agreement.

Subd. 2. **Cash price limits rules.** The commissioner of commerce shall adopt rules governing cash price limits for rental-purchase agreements. Notwithstanding section 14.18, the rules are effective 45 working days after the notice of adoption is published in the State Register.

Subd. 3. **Delivery charges; security deposits; collection fees.** A lessor may not charge a delivery charge that is greater than $15 for five items or less or $30 for more than five items. A lessor may not charge a security deposit. A lessor may contract for and receive a charge for picking up payments from the lessee if the lessor is required or requested to visit the lessee's dwelling to pick up a payment. In a consumer rental-purchase agreement with payment or renewal dates which are more frequent than monthly, this charge shall not be assessed more than three times in any three-month period. In consumer rental-purchase agreements with payments or renewal options which are at least monthly, this charge shall not be assessed more than three times in any six-month period. A charge assessed pursuant to this subdivision shall not exceed $7. This charge is in lieu of a late charge assessed for the applicable payment period.

325F.92 LESSOR'S COMMUNICATIONS CONCERNING LESSEE.

Subdivision 1. **Location information.** A lessor in communication with any person other than the lessee for the purpose of acquiring information as to the location of a lesser shall:

(1) identify the lessor and state that the lessor is confirming or correcting location information concerning the lessee;

(2) not communicate with any person more than once unless requested to do so by the person or unless the lessor reasonably believes that the earlier response is erroneous or incomplete and that the person now had correct or complete location information;

(3) not communicate by postcard;

(4) not use any language or symbol on any envelope or in the contents of any communication that indicates that the communication relates to the recovery or repossession of property; and

(5) not communicate with any person other than the lessee's attorney, after the lessor knows the lessee is represented by an attorney with regard to the rental-purchase agreement and has knowledge of, or can readily ascertain, the attorney's name and address, unless the attorney fails to respond within a reasonable period of time to communication from the lessor or unless the attorney consents to direct communication with the lessee.

Subd. 2. **Time and place.** Without the prior consent of the lessee given directly to the lessor or the express permission of a court of competent jurisdiction, a lessor may not communicate with a lessee in connection with the recovery or repossession of property:

(1) at the lessee's place of employment; or

(2) at any unusual time or place or a time or place known or which should be known to be inconvenient to

the lessee. In the absence of knowledge of circumstances to the contrary, a lessor shall assume that the convenient time for communicating with a lessee is after 8:00 a.m. and before 9:00 p.m., local time, at the lessee's location.

Subd. 3. **Authorized communications.** A lessor may not communicate, in connection with the rental-purchase agreement, with any person other than the lessee, the lessee's attorney, or the lessor's attorney, except as reasonably necessary to acquire location information concerning the lessee as provided under subdivision 1, or upon prior consent of the lessee given directly to the lessor, or upon express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy.

Subd. 4. **Ceasing communication.** If a lessee notifies the lessor in writing that the lessee wishes the lessor to cease further communication with the lessee, the lessor shall not communicate further with the lessee with respect to the rental-purchase agreement, except:

(1) to advise the lessee that the lessor's further efforts are being terminated;

(2) to notify the lessee that the lessor may invoke specified remedies allowable by law which are ordinarily invoked by the lessor; or

(3) where necessary to effectuate any postjudgment remedy.

Subd. 5. **Harassment or abuse.** A lessor may not harass, oppress, or abuse any person in connection with a rental-purchase agreement. The following conduct is a violation of this subdivision:

(1) the use or threat of use of violence or the criminal means to harm the physical person, reputation, or property of any person;

(2) the use of obscene, profane, or abusive language;

(3) causing a telephone to ring, or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person; and

(4) the placement of telephone calls without disclosure of the caller's identity.

325F.93 EARLY PURCHASE OPTION.

At any time after the first periodic payment is made, the lessee may acquire ownership of the property by tendering 55 percent of the difference between the total of scheduled payments and the total amount paid on the account.

325F.94 CLAIMS AND DEFENSES.

An assignee of the contract or obligation relating to the rental-purchase lease transaction is subject to all claims and defenses of the lessee against the lessor arising from the rental-purchase lease transaction, notwithstanding any agreement to the contrary.

325F.95 LIABILITY; LIABILITY DAMAGE WAIVER.

Subdivision 1. **Liability of lessee.** The lessee is liable for loss, destruction, or damage of the rental property

during the term of the rental agreement. The amount for which the lessee may be held liable in the case of loss or destruction of the property may not exceed the price that the lessee would have paid to exercise an early purchase option. In the case of damage to the property other than normal wear and tear, the lessee is liable for the price that the lessee would have paid to exercise an early purchase option or the cost of repair as reasonably determined by the lessor, whichever is less.

Subd. 2. **Liability damage waiver.** (a) The lessor must offer a liability damage waiver to the lessee to cover the lessee's liability for any loss, destruction, or damage of the rental property. The cost of the liability damage waiver may not exceed ten percent of the lessee's lease payment.

(b) The lessor must inform the lessee of the following options available to the lessee regarding the property subject to a rental-purchase agreement:

(1) furnish insurance coverage on the property through an existing insurance policy that is owned by the lessee;

(2) purchase insurance coverage on the property through any insurer authorized to transact business in this state;

(3) purchase liability damage waiver coverage from the lessor; or

(4) decline to furnish or purchase insurance coverage or liability damage waiver coverage.

325F.96 EXEMPTED TRANSACTION.

Sections 325F.84 to 325F.97 do not apply to agreements for the rental of property in which the person who rents the property has no legal right to become the owner of the rented property at the end of the rental period.

325F.97 PENALTIES AND REMEDIES.

Subdivision 1. **Disclosure penalties and remedies.** A lessor who is found to have violated sections 325F.86 to 325F.88 is subject to the penalties and remedies provided in section 8.31.

Subd. 2. **Application of other law.** A violation of section 325F.90, 325F.91, or 325F.93 shall be treated as a violation of section 325F.69. The remedies provided by section 325F.90, 325F.91, or 325F.93 are cumulative and shall not be construed as restricting any remedy that is otherwise available.

Subd. 3. **Offsets limited.** A lessee may not take any action to offset any amount for which a lessor is potentially liable under this section against any amount owed by the lessee, unless the amount of the liability of the lessor has been determined by a judgment of a court of competent jurisdiction in an action in which the lessor was a party. This section does not bar a lessee in default on an obligation arising from the rental-purchase agreement from asserting a violation of this chapter in an original action, or as defense or counterclaim to an action brought by the lessor to collect amounts owed by the lessee pursuant to the rental-purchase agreement.

Subd. 4. **Lessor's right to correct error.** A lessor is not liable under this section for a violation of sections 325F.84 to 325F.96 if, within 60 days after discovering an error and before an action for damages is filed against the lessor pursuant to this section or written notice of the error is received from the lessee, the lessor notifies the lessee of the error and makes adjustments to the account of the lessee that are necessary to assure that the lessee is not required to pay an amount in excess of the amounts actually disclosed. This subdivision applies whether the error was discovered through the lessor's own procedures or by any other means.

Subd. 5. **Limitation of liability.** A lessor is not liable under this section for damages in excess of the actual damage sustained by the lessee if the lessor shows by a preponderance of the evidence that the violation of sections 325F.84 to 325F.96 resulted from a bona fide error notwithstanding the maintenance by the lessor of procedures reasonably adopted to avoid the error. As used in this subdivision, "bona fide error" includes, but is not limited to: clerical, calculation, computer malfunction and programming, and printing errors.

325F.98 LEGISLATIVE RECOMMENDATIONS.

The commissioner of commerce shall review and may make recommendations concerning the cost of liability damage waivers required under section 325F.95, subdivision 2, to the legislature.

APPENDIX F
MINNESOTA STATUTES
CHAPTER 334
MONEY, RATES OF INTEREST

334.01 RATE OF INTEREST.

Subdivision 1. **General.** The interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year. In the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity nor shall it apply to any agreement which extends the maturity date of any contract, note, or instrument, and provides for an increased rate of interest after the original maturity date on the indebtedness then due. Any agreement which extends maturity date of any contract, note or instrument shall not provide for an increased rate of interest in excess of $8 on $100 for one year.

Subd. 2. **Contracts of $100,000 or more.** A contract for the loan or forbearance of money, goods, or things in action, in the amount of $100,000 or more, and any extensions, including extensions of installments and related changes in the terms thereof, shall be exempt from the provisions of this chapter and the interest for the indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing.

Subd. 3. **Contracts under Employee Retirement Income Security Act of 1974.** A contract entered into on or after December 31, 1974, for the loan or forbearance of money, goods, or things in action and any extensions, including extensions of installments and related changes in its terms between a participant, former participant, or beneficiary, and a plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, United States Code, title 29, chapter 18, as amended through December 31, 1982, is exempt from the provisions of this chapter.

334.02. Usurious interest; recovery

Every person who for any such loan or forbearance shall have paid or delivered any greater sum or value than in section 334.01 allowed to be received may, personally or through personal representatives, recover in an action against the person who shall have received the same, or the receiver's personal representatives, the full amount of interest or premium so paid, with costs, if action is brought within two years after such payment or delivery. This section does not apply when the loan or forbearance is made by a lender and the lender is liable

for the penalty provided in section 48.196 or chapter 56 in connection with the loan or forbearance. For purposes of this section, the term "lender" means a bank or savings bank organized under the laws of this state, a federally chartered savings and loan association, a savings association organized under chapter 51A, a federally chartered credit union, a credit union organized under chapter 52, an industrial loan and thrift company organized under chapter 53, a licensed lender under chapter 56, or a mortgagee or lender approved or certified by the secretary of housing and urban development or approved or certified by the administrator of veterans affairs.

334.03. Usurious contracts invalid; exceptions

All bonds, bills, notes, mortgages, and all other contracts and securities, and all deposits of goods, or any other thing, whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance of any money, goods, or things in action than prescribed, except such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute, shall be void except as to a holder in due course. No merely clerical error in the computation of interest, made without intent to avoid the provisions of this chapter, shall constitute usury. Interest at the rate of 1/12 of eight percent for every 30 days shall not be construed to exceed eight percent per annum; nor shall the payment of interest in advance of one year, or any less time, at a rate not exceeding eight percent per annum constitute usury; and nothing herein shall prevent the purchase of negotiable mercantile paper, usurious or otherwise, for a valuable consideration, by a purchaser

without notice, at any price before the maturity of the same, when there has been no intent to evade the provisions of this chapter, or where such purchase has not been a part of the original usurious transactions; but where the original holder of a usurious note sells the same to an innocent purchaser, the maker thereof, or the maker's representatives, may recover back from the original holder the amount of principal and interest paid on the note. This section does not apply when the loan or forbearance is made by a lender and the lender is liable for the penalty provided in section 48.196 or chapter 56 in connection with the loan or forbearance. For purposes of this section, the term "lender" means a bank or savings bank organized under the laws of this state, a federally chartered savings and loan association, a savings association organized under chapter 51A, a federally chartered credit union, a credit union organized under chapter 52, an industrial loan and thrift company organized under chapter 53, a licensed lender under chapter 56, or a mortgagee or lender approved or certified by the secretary of housing and urban development or approved or certified by the administrator of veterans affairs.

334.05. Usurious contracts; cancellation

When it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security, or evidence of debt is void under the provisions of this chapter it shall declare the same to be void, enjoin any proceeding thereon, and order it to be canceled and given up.

APPENDIX G

MINNESOTA STATUTES

CONSUMER CREDIT SALES

325G.15 DEFINITIONS.

Subdivision 1. As used in this section and section 325G.16, the following terms shall have the meanings assigned to them.

Subd. 2. "Consumer credit sale" means a sale of goods or services in which

(a) credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind;

(b) the buyer is a natural person; and

(c) the goods or services are purchased primarily for a personal, family or household purpose, and not for commercial, agricultural, or business purpose.

Subd. 3. "Goods" means all tangible personal chattels, but not including money, things in action or intangible personal property other than merchandise certificates or coupons as herein described. The term includes such chattels which are furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property so as to become a part thereof whether or not severable therefrom. The term also includes merchandise certificates or coupons, issued by a retail seller, not redeemable in cash and to be used in their face amount in lieu of cash, in exchange for goods or services sold by such seller.

Subd. 4. "Services" means work, labor, or services of any kind.

Subd. 5. "Sale of goods" includes, without limitation, any agreement in the form of a bailment or lease of goods if the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the goods upon full compliance with the bailee's or lessee's obligations under the agreement. The term also includes a contract in the form of a terminable bailment or lease of goods if: (a) the bailee or lessee has the option to renew the contract by making the payments specified in the contract; (b) the contract obligates the bailor or lessor to transfer ownership of the property to the bailee or lessee for no other or a nominal consideration upon full compliance by the bailee or lessee with the bailee's or lessee's obligations under the contract including any obligation incurred by reason of the exercise of an option by the bailee or lessee to renew the contract; and (c) the payments contracted for by the bailee or lessee, including those payments pursuant to the exercise of an option by the bailee or lessee to renew the contract, are substantially equivalent to or in excess of the aggregate value of the property and services involved.

325G.16 RESTRICTIONS.

Subdivision 1. **Instruments.** In a consumer credit sale, the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee. A holder is not in good faith if the

holder takes a negotiable instrument with notice that it is issued in violation of this section.

Subd. 2. **Provision restrictions.** No contract or obligation relating to a consumer credit sale shall contain any provision by which:

(a) The consumer agrees not to assert against an assignee any claim or defense arising out of the transaction;

(b) In the absence of consumer's default, the holder may arbitrarily and without reasonable cause, accelerate the maturity of any part or all of the amount owing thereunder;

(c) A power of attorney is given to confess judgment in this state, or an assignment of wages is given;

(d) The seller or holder of the contract or obligation, or a person acting on the seller's or holder's behalf, is given authority to enter upon the consumer's premises unlawfully or to commit any breach of the peace in the repossession of the goods;

(e) The consumer waives any right of action against the seller or holder of the contract or obligation, or any other person acting on the seller's or holder's behalf, for any illegal act committed in the collection of payments under the contract or obligation or in the repossession of goods;

(f) The consumer relieves the seller from any liability for any legal remedy which the consumer may have against the seller under the contract or obligation or any separate instrument executed in connection therewith.

Subd. 3. **Claims and defenses.** Any assignee of the contract or obligation relating to the consumer credit sale shall be subject to all claims and defenses of the consumer against the seller arising from the sale, notwithstanding any agreement to the contrary. Provided, however, that the assignee's liability under this subdivision shall not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. The rights of the consumer under this subdivision can only be asserted as a matter of defense to or set off against a claim by the assignee.

Subd. 4. **Interest retained by bailor or lessor.** Any lease or bailment of goods which constitutes a consumer credit sale shall be deemed to be a sale for all purposes. The interest retained by the bailor or lessor in any such transaction shall be a security interest only.

Subd. 5. **Mandatory provision.** All contracts or obligations in the form of terminable bailment or lease of goods relating to consumer credit sales shall specify whether the goods which are the subject of the sale are new or used.

Supreme Court, U.S.
FILED

961233 MAR 5 1997

No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1996

THORN Americas, Inc. (formerly known as Rent-A-Center, Inc.), a Delaware corporation, and THORN EMI North America Holdings, Inc., a Delaware corporation,

Petitioners,

v.

Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Phillip A. Cole
Counsel of Record
Kay Nord Hunt
LOMMEN, NELSON,
COLE & STAGEBERG,
P.A.
1800 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

LEGAL AID SOCIETY
OF MINNEAPOLIS
David L. Ramp
2507 Fremont Avenue N.
Minneapolis, MN 55411
(612) 588-2099

MANSFIELD & TANICK,
P.A.
Seymour J. Mansfield
1560 International Centre
900 Second Avenue S.
Minneapolis, MN 55402
(612) 339-4295

Attorneys for Respondents

1997 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

60 pp

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. Introduction 1

B. Historical Recognition That Rent-To-Own Transactions Are Subject To Usury Statute 2

1. Credit Sales Under CCSA Are Subject to Usury Statute 2

2. Proposed Federal Legislation Preempting State Consumer Credit Laws Not Enacted 5

3. Passage of Legislation Exempting Rental Purchase Agreements from CCSA and Usury Statute Failed in Minnesota 7

C. Procedural History Of This Case 10

REASONS FOR DENYING THE WRIT 16

I. THE EIGHTH CIRCUIT ASSUMED THAT THIS COURT'S RULING IN BOUIE APPLIED TO THIS CIVIL CASE BUT CONCLUDED THAT THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF MINNESOTA LAW WAS NOT "UNEXPECTED OR INDEFENSIBLE" 17

II. THE EIGHTH CIRCUIT'S REJECTION OF RAC'S VOID FOR VAGUENESS ARGUMENT IS IN FULL ACCORD WITH DECISIONS OF THIS COURT 21

CONCLUSION 23

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 325F 1, 10
Minn. Stat. § 325G 1, 2, 10-12
Minn. Stat. § 334.01 ..... 2, 11, 12
Minn. Stat. § 334.02 2
Minn. Stat. § 334.03 ..... 2, 12

Rules:

28 U.S.C. § 1292(a)(1) 14

Cases:

Adjustment Service Bureau, Inc. v. Buelow
196 Minn. 563, 265 N.W. 659 (1936) 20

Barton v. Moore
__ N.W.2d __ (1997 WL 58699) (Minn. 1997) 2, 22

BMW of North America, Inc. v. Gore
__ U.S. __, 116 S.Ct. 1589 (1996) 22

Bouie v. City of Columbia
378 U.S. 347 (1964) 15, 17, 18, 20

Collins v. Youngblood
497 U.S. 37 (1990) 17

Fogie v. Rent-A-Center, Inc.
518 N.W.2d 544 (Minn. 1994) 2, 12

Fogie v. THORN Americas, Inc.
95 F.3d 645 (8th Cir. 1996), reh'g and
suggestion for reh'g en banc denied (1996) 14-16, 18, 20-22

Grayned v. City of Rockford
408 U.S. 104 (1972) 14, 15, 21

Great Northern Ry. Co. v. Sunburst Oil & Refining Co.
287 U.S. 358 (1932) 21

Marks v. United States
430 U.S. 188 (1977) 17

Miller v. Colortyme, Inc.
504 N.W.2d 258 (Minn. Ct. App. 1993) 11

Miller v. Colortyme, Inc.
518 N.W.2d 544 (Minn. 1994) ..... passim

United States v. Burnom
27 F.3d 283 (7th Cir. 1994) 20

United States v. Donnelly's Estate
397 U.S. 286 (1970) 20

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.
455 U.S. 489 (1982), reh'g denied, 456 U.S. 950
(1982) 14, 15, 21, 22

Wainright v. Stone 21
414 U.S. 21 (1973)

Other Authorities:

James Nehf, Effective Regulation of Rent-To-Own Contracts, 52 Ohio St. L.J. 751 (1991)..... 7

To Amend the Consumer Credit Protection Act with Respect to Consumer Leases and Rental-Purchase Agreements: Hearings on S.1152 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 98th Cong., 1st Sess. (July 19, 1983) (Testimony of J. Samuel Choate, Jr., counsel to APRO)..... 6

Tran[illegible]ipt of Hearings on S.F. No. 1499 Before the Minnesota Senate, Comm. of the Whole (March 21, 1990).... 9

STATEMENT OF THE CASE

A. Introduction.

Appellant/Petitioner Thorn Americas, Inc. operates a chain of stores and offers a variety of consumer goods for sale under its "rent to own" transactions. Appellant EMI North America Holdings, Inc. owns all of the stock of Thorn Americas, Inc. Appellants operate their stores under the business name "Rent-A-Center."

By its highly selective and self-serving recitation of the facts, Petitioners Thorn Americas, Inc., et al. (hereinafter RAC)[1] attempt to premise issues for this Court's review which factually do not exist. As will be explained, Minnesota's statutory treatment of rental purchase contracts (also known as rent-to-own contracts) is unique. The Minnesota statutes in issue -- Minnesota's usury statute - Minn. Stat. § 334.01, et. seq. at App. 80; Minnesota's Consumer Credit Sales Act (CCSA) - Minn. Stat. § 325G et. seq. at App. 84 and Minnesota's Rental Purchase Agreement Act (RPAA) - Minn. Stat. § 325F et. seq. at App. 63 -- were all enacted before RAC and the Plaintiff Class entered into the thousands of rental purchase agreements which are at issue here. The Minnesota Supreme Court's holding that these rental purchase agreements as credit sales were subject to and in violation of Minnesota's usury statute was reasonable and foreseeable. That RAC's assertions in its Petition have no merit is quickly evident by a review of the rent-to-own industry and RAC's recognition of and unsuccessful attempts to avoid exactly what

---

[1] In keeping with the Eighth Circuit's opinion, Petitioners will be collectively referred to as "RAC" in this Response to Petitioners' Petition for Certiorari. References to Petitioners' Appendix will be "App." References to Respondent Plaintiff Class' Appendix will be "A." References to Respondents' Court of Appeals Appendix will be "C.A.R.A."

the Minnesota Supreme Court ruled in Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994) at App. 45 and in Fogie v. Rent-A-Center, Inc., 518 N.W.2d 544 (Minn. 1994) at App. 44.

For the Court's benefit, Respondents/Plaintiffs Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated (hereinafter Plaintiff Class) will present the facts fully in order to convey a more accurate picture for the Court.

B. Historical Recognition That Rent-To-Own Transactions Are Subject To Usury Statute.

1. Credit Sales Under CCSA Are Subject to Usury Statute.

Under the terms of RAC's rental purchase agreements, a buyer acquires ownership of consumer goods while deferring payment over time. Miller, 518 N.W.2d at 547 at App. 53. While these rent-to-own transactions purport to be short-term leases, they operate, in substance, like ordinary installment sales. Id. Since 1981, terminable leases (which include RAC's rental purchase agreements) have been defined by Minnesota statute as credit sales. Minn. Stat. § 325G.15, subd. 5 at App. 85; Miller, 518 N.W.2d at 547 at App. 50-51. As a credit sale, these transactions were always subject to Minnesota's usury statute (8% interest rate if contracted for in writing). Miller, 518 N.W.2d at 548 at App. at 53-54. See Minn. Stat. § 334.01. at App. 80. Since 1877, the remedy for violation of § 334.01 of the usury statute has been forfeiture of any interest paid under § 334.02 and entitlement by the victim to have the contract declared void under § 334.03 so that the victim of usury is not liable for the principal or the interest. Minn. Stat. §§ 334.02 and 334.03 at App. 81 and 83. Barton v. Moore, __ N.W.2d __ (1997 WL 58699) (Minn. 1997).

RAC, as well as the rent-to-own industry in general, has long recognized that if terminable leases are credit sales under a state's law, its rental purchase agreements are subject to that state's usury law. RAC, for example, in its 1983 prospectus acknowledged as follows:

> Regulation
>
> Every state in which the Company does business has laws governing consumer credit sales. . . . Some courts, however, have held that a terminable rental agreement may be considered a credit sale, depending upon the facts and circumstances of the case . . .
>
> If these laws were found to be applicable to the Company's rental agreements, the rental payments made to the Company may not come within the applicable state interest rate and finance charge limitations. . . . The penalties for violating such statutes vary from state to state, but may include . . . forfeiture of the right to collect any payments of principal or interest.

Rent-A-Center, Inc., 1983 Prospectus (1983) at A. 12-13.

As early as 1981, the Association of Progressive Rental Organizations (APRO), the national trade association for the rent-to-own industry of which RAC is a member, acknowledged in its national publication that if terminable leases were found to be credit sales, state usury statutes could apply to rent-to-own transactions with disastrous results:

> One final point should be made regarding "price unconscionability." Could a consumer attorney argue successfully that a terminable lease is a disguised installment sale for usury purposes? If a court were to treat such a lease as a disguised installment sale, the excess of the total rental payments over the estimated cash purchase price would be considered as finance charge subject to any applicable installment sale legislation. This could be disastrous.

Association of Progressive Rental Organizations, Legal Information Packet (1981) at A. 16. (Emphasis in the original). APRO went on to advise its members:

> . . . [T]he option to terminate at the end of any weekly or monthly rental period should insulate the industry from attack based upon a usury theory. Nonetheless, counsel for leasing companies in various states should be aware of special state statutes which may broaden the definition of a "consumer sale" to include terminable leases and thus raise usury questions.

Id. at A. 17. (Emphasis added).

RAC's counsel also specifically informed RAC (or its affiliates) in 1984 that if these rent-to-own transactions are deemed to be consumer credit sales under Minnesota law, they were subject to and in violation to Minnesota's usury statute. Counsel for RAC in 1984 advised as follows:

> However, I also [was] asked whether there are precautions that can be taken to comply with laws that would apply if the [rent-to-own] agreement were to be recharacterized as a credit sale by a court's interpretation. . . . Because of the extremely low legal interest rate applicable to such agreement in Minnesota (8%) [referencing rate contained in Minn. Stat. § 334.01 of the usury statute], it probably would not be possible to convince a court that the agreement was lawful if it should ever be construed as a credit sale contract.

A. 30. Given this record, RAC's argument that no reasonable person reading Minnesota statutes could have foreseen that these rental purchase contracts violated Minnesota's usury statute is, to say the least, disingenuous.

2. Proposed Federal Legislation Preempting State Consumer Credit Laws Not Enacted.

Based on its recognition that its transactions may, indeed, be credit sales and subject to a state's usury laws, the rent-to-own industry first directed its efforts at enactment of federal legislation that would preempt its transactions from state consumer credit laws, such as those in Minnesota. RAC supported the adoption of such a federal law. See Rent-A-Center, Inc., Annual Report, Form 10-K for fiscal year ended 7/31/87 (1987) at A. 21.

Industry representatives testified before the United States Senate that federal regulation of terminable leases was necessary to prevent, among other things, the application of state usury statutes to rent-to-own contracts. J. Samuel Choate, APRO's counsel, tellingly testified:

> The essence of the problem is efforts by state legislatures or courts to characterize the short-term consumer lease as something it is not, by labeling it a purchase or a credit sale.
>
> The result for the industry is that, under state law, disclosure and other requirements (usury limits, for example) that have been designed to apply to credit sales would become applicable to short-term leases.

To Amend the Consumer Credit Protection Act with Respect to Consumer Leases and Rental-Purchase Agreements: Hearings on S.1152 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 98th Cong., 1st Sess. (July 19, 1983) (Testimony of J. Samuel Choate, Jr., counsel to APRO) at A. 25. (Emphasis added.)

Another APRO attorney's letter to Subcommittee Chair, Senator Paula Hawkins, warns of the same consequence should the state's consumer protection laws not be overridden by APRO's proposed federal legislation:

> Usury limits - . . . Lease transactions, if characterized as "credit sales", would become subject to such usury limits.

Letter of Sheldon Schreiberg to Sen. P. Hawkins (Aug. 12, 1983) at A. 27. A copy of this letter was received by Tom Devlin, director and principal stockholder in RAC. Id. at A. 29.

The industry's efforts to immunize its business from state usury laws through a federal enactment ultimately failed. The

rent-to-own industry then turned its efforts to the individual state legislatures seeking to repeal statutes akin to Minnesota's CCSA to avoid being subject to the usury statute.

3. Passage of Legislation Exempting Rental Purchase Agreements from CCSA and Usury Statute Failed in Minnesota.

The rent-to-own industry pursued in the Minnesota Legislature, as it did elsewhere, the enactment of a rent-to-own industry sponsored bill that would distinguish and exempt rental purchase agreements from consumer credit sales statutes and insulate these transactions from attack under the usury law. James Nehf, Effective Regulation of Rent-to-Own Contracts, 52 Ohio St. L.J. 751, 821 (1991).[2] The rent-to-own industry's goal was to repeal any application of the Consumer Credit Sales Act and therefore the usury statute to these rental purchase transactions. Id.

As initially introduced in the Minnesota Legislature, as elsewhere, the RPAA would have insulated the rent-to-own transactions from Minnesota's CCSA and Minnesota's usury statute. Miller, 518 N.W.2d at 550, App. at 59. RAC's reference to Minnesota legislative history with regard to the enactment of the RPAA is grossly misleading. RAC's Petition references a Minnesota Senate Commerce Committee Hearing on March 1, 1990. In actuality, the Commerce Committee Bill was later greatly modified with the Minnesota Senate expressly rejecting many key provisions of the bill which were the subject of the earlier Commerce Committee hearings. A

---

[2] It should be noted that the author of that article, James Nehf, was, prior to being a law professor, a member of the law firm that represented RAC and APRO and wrote most of the industry's model bill. N.Y. Times, June 4, 1988, at p. 56. Nehf does not acknowledge his previous connection to the rent-to-own industry and the effect it had on his observations in his article.

key amendment was made taking out the industry's language which would have explicitly exempted rent-to-own transactions from the CCSA. Id. The following excerpts from the 1990 Minnesota Senate's debate demonstrate the Minnesota Legislature's unmistakable intent to continue to regulate rental purchase transactions under the CCSA and maintain their status as a credit sale under Minnesota law:

> Senator Ember D. Reichgott:
>
> . . . We had a great deal of discussion on this bill in Judiciary, and the issue there really was whether or not these transactions - these rent-to-own transactions should be covered under - as a credit sale. Should they be a credit sale and have the protections of the interest rate of consumer protection in our law, or are they something else that should be exempted out from the credit sales. . . . Unfortunately, what Senator Dahl's bill [sponsor of the industry's bill] is doing is deleting that language, and so, under Senator Dahl's bill, if you don't adopt my amendment, you would not have any way, shape or form to call this a credit sale any longer. And so you would have deregulation. You would have no consumer protection; you would have no interest cap; you would have nothing to protect these consumers. Now, I believe this is a sale. I believe it's as much a sale as any other kind of installment contract. . . . If it is a sale, then lets treat it as a sale. Let's call it a sale, and lets keep the law as it is. . . .

Senator Gary W. Laidig:

> Mr. Chairman. The reason that we need to adopt the Reichgott Amendment - the only reason we had a fifteen minute explanation of all the protections and the guarantees and the consumer protection, the only reason we had that explanation is 'cause the industry wants to write themselves out of the law. Look on page 14. In 1981, this Legislature wrote this language to bring this industry under control. . . . And the reason Senator Dahl gave us a fifteen minute explanation of all the protection that the industry wants is because they want out from the law that [was] written to include them.

Senator Ember D. Reichgott:

> Mr. President, one clarification. My amendment does not take away any of the consumer protections. It leaves in Sections 1 to 14 which are the consumer protections. The reason that Senator Dahl says this bill will be unworkable if my amendment is adopted is because the industry won't want to pass just consumer protection unless they are exempted out of the credit sale act.

Transcript of Hearings on S.F. No. 1499 Before the Minnesota Senate, Comm. of the Whole (March 21, 1990) at A. 1.[3]

---

[3] At those 1990 hearings, Attorney J. Samuel Choate represented the Minnesota Rental Dealers Association, of which RAC is a member, and testified in support of the industry bill. Senator Dahl was the sponsor of the rent-to-own industry's bill.

As originally proposed, the RPAA would have explicitly excluded applicability of the CCSA to rental purchase agreements. Amendments were subsequently adopted in Minnesota to the RPAA that deleted any provisions that would have excluded the applicability of the CCSA to these rental purchase agreements. As amended and enacted, all consumer protection statutes, including the CCSA and the usury statute, continued to apply expressly to rental purchase agreements. Miller, 518 N.W.2d at 550 at App. 59; Minn. Stat. § 325F.97, subd. 2 at App. 78. The Minnesota legislature explicitly rejected any notion that the RPAA repealed the remedies of Minnesota's consumer protection statutes or that its terms were to be the sole regulator of rent-to-own transactions. Id.

C. Procedural History Of This Case.

RAC and the Plaintiff Class entered into thousands of rental purchase contracts in Minnesota between August 1, 1990 and the present date. C.A.R.A. at 19. As previously stated, all of these contracts were entered into after the enactment of Minnesota's CCSA, the RPAA and the usury statute. These contracts, it was argued by Plaintiff Class, constituted "consumer credit sales" within the meaning of CCSA and were subject to Minnesota's usury statute, which RAC had violated. On March 2, 1993, Federal District Court Judge Diana E. Murphy issued an Order granting Plaintiff Class' motion to certify the class. She also ruled that RAC's rent-to-own contracts are consumer credit sales for all purposes within the meaning of Minn. Stat. §§ 325G.15 and 325G.16. C.A.R.A. at 1.

Plaintiff Class subsequently brought a motion for a permanent injunction and for partial summary judgment asserting that since RAC's contracts are deemed consumer credit sales, it followed that RAC had violated Minnesota's

usury statute, Minn. Stat. § 334.01. While those motions were under advisement, the Minnesota Court of Appeals in Miller v. Colortyme, Inc., 504 N.W.2d 258 (Minn. Ct. App. 1993), held that rent-to-own contracts are a "sale of goods" under the CCSA, but that they are not consumer credit sales within the meaning of the CCSA.

Plaintiff Class requested that this case be stayed pending review by the Minnesota Supreme Court of the Miller decision and requested that the district court certify the following questions to the Minnesota Supreme Court: (1) are rent-to-own contracts consumer credit sales under Minn. Stat. § 325G.15, et. seq. and (2) does the usury statute, Minn. Stat. § 334.01, et. seq., apply to rent-to-own contracts? RAC opposed certification, arguing that Miller provided a clear statement of Minnesota law that applied to this case.

The federal district court, in the exercise of its discretion, certified the above stated issues to the Minnesota Supreme Court. C.A.R.A. at 295. In its brief to the Minnesota Supreme Court, while complaining that no factual statement accompanied the certified question, RAC also acknowledged that "the terms of [RAC]'s rental purchase agreement are, however, undisputed and are sufficient for the Court's determination of the certified questions." (RAC's Brief to the Minnesota Supreme Court, CV-93-1801, dated 12/1/93 at p. 10.)

The Minnesota Supreme Court in Miller v. Colortyme, Inc.,[4] 518 N.W.2d 544 (Minn. 1994) at App. 45, reversed the Court of Appeals in its entirety. The Supreme Court held that based on its review of the CCSA, rent-to-own contracts are protected "consumer credit sales" within the meaning of Minn. Stat. § 325G.15, subd. 2. Id. at 548, App. at 52.

The Minnesota Supreme Court also held that rent-to-own contracts are usurious as a matter of law. Id. at 550, App. at

[4] The Defendant in Miller is referred to as DEF.

58. By defining rent-to-own transactions in the CCSA as "consumer credit sales," the Minnesota Legislature has established that consumers who enter into rent-to-own transactions are to benefit from the same protections as consumers who purchase goods through ordinary installment sales. The Supreme Court recognized that the economic reality of these transactions is that of credit sale. As a credit sale, the finance charge levied in the transaction was subject to the limitation of the usury statute. Id. at 548, App. at 52-53.

The Minnesota Supreme Court specifically addressed DEF's argument that the RPAA had repealed the CCSA. Miller, 518 N.W.2d at 551, App. at 62. Based on the statutory language and its legislative history, the Minnesota Supreme Court concluded that there was no repeal of the CCSA; rather, the remedies in the two statutes, as stated in the statutes themselves, are cumulative. Id.

This case was argued on certified questions to the Minnesota Supreme Court concurrently with the argument in Miller.[5] Citing its analysis in Miller, the Minnesota Supreme Court in this case held that RAC's contracts with Plaintiff Class were "consumer credit sales" and were subject to the usury statute. Fogie, 518 N.W.2d at 544, App. at 45.

Undaunted, RAC continued to conduct its business in violation of Minnesota law. Plaintiff Class, upon remand to

---

[5] RAC asserts in its Petition on page 6 that Minnesota's usury statute does not apply to "such instruments which are taken or received in accordance with and in reliance upon the provisions of any statute," citing Minn. Stat. § 334.03. What RAC fails to inform the Court is that this assertion was untimely raised for the first time in its appeal to the Eighth Circuit from the grant of injunctive relief. (Appellees' Brief to Eighth Circuit p. 430, n 17.) In addition to such argument being untimely raised, it is fatally flawed. These rental purchase agreements could never extract an interest rate greater than set forth in Minn. Stat. § 334.01. Further, the term "instrument" means a negotiable instrument. Therefore, as a matter of law this exception has no application to RAC.

the federal district court, brought a motion for partial summary judgment against RAC seeking the following:

- A finding that the contracts are usurious as a matter of law.

- A finding that in connection with the Plaintiff Class RICO claim, the interest rate charged the Plaintiff Class was more than twice the rate permitted by Minnesota law.

- A finding of the appropriate measure for damages for usury under Minnesota law and a declaration that Plaintiff Class members holding executory rent-to-own contracts with RAC had no obligation to make any further payment.

- A permanent injunction enjoining RAC from engaging in credit sales transactions subject to Minnesota law and an interest rate in excess of the maximum allowed under Minnesota law.

In response, RAC argued that there were genuine issues of material fact regarding the presence of the required elements of usury, that Plaintiff Class' rent-to-own contracts are within the time price exception of the usury statute, that Minnesota's CCSA and the usury statute are unconstitutional as interpreted and applied by the Minnesota Supreme Court, that Plaintiff Class did not prove the existence of any unlawful debt in violation of RICO and that Plaintiff Class is not entitled to the remedies it seeks.

By Order dated September 28, 1995, the federal district court held, in accord with the Minnesota Supreme Court's answers to the certified questions, that the rental purchase contracts issued by RAC to the Plaintiff Class are consumer

credit sales contracts for all purposes and are subject to the Minnesota general usury statute. The contracts also were found to be usurious as a matter of law. App. at 22.

The district court rejected RAC's assertions that the Minnesota Supreme Court's interpretation of the CCSA, the RPAA and the usury statute renders those statutes unconstitutionally vague and that application of this interpretation was unconstitutional as a violation of due process. Id. at App. 30-33. The district court concluded that under Minnesota law the available remedies to Plaintiff Class are voiding the contract and recovering all interest and principal paid or retaining the property and refunding the interest paid. From the date of this Order, the federal district court enjoined RAC from entering into credit sales transactions within the State of Minnesota which bear interest at annual rates in excess of the maximum rate permitted under Minnesota law. Id. at App. 42.

RAC appealed this interlocutory order granting injunctive relief to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1292(a)(1). In seeking reversal of this grant of injunctive relief, RAC argued that the Minnesota Supreme Court's interpretation of Minnesota statutes had violated its constitutional rights. The Eighth Circuit disagreed. Fogie v. THORN Americas, Inc., 95 F.3d 645, 650 (8th Cir. 1996), reh'g and suggestion for reh'g en banc denied (1996) at App. 9. The Eighth Circuit concluded that these statutes passed the vagueness test enunciated by this Court in Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) and Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982), reh'g denied, 456 U.S. 950 (1982). Fogie, 95 F.3d at 650, App. at 10-11. Based on its review of the Minnesota statutes, the Eighth Circuit concluded:

> These statutory provisions give sufficient notice to those engaged in the rent-to-own industry that their rental purchase contracts fall within the CCSA and are subject to usury laws. They also provide standards by which the courts can apply the statutes without engaging in subjective or arbitrary policy making decisions. Accordingly, the statutes pass the vagueness test enunciated in Grayned v. City of Rockford and Village of Hoffman Estates.

Id. at 650-51, App. at 11.

Citing Bouie v. City of Columbia, 378 U.S. 347 (1964), the Eighth Circuit also concluded that the Minnesota Supreme Court's judicial construction of these statutes was "not 'unexpected or indefensible by reference to' the statutory framework already in place." Fogie, 95 F.3d at 651, App. at 13. There was no due process violation. The Eighth Circuit found "the judicial construction of those statutes is reasonable and foreseeable," gave full meaning to the statutory language, operated in the manner clearly intended by the Minnesota Legislature, and furthered the consumer protective objectives of the statutes. Id. The Eighth Circuit specifically noted that Miller did not overrule any prior contrary ruling of the Minnesota Supreme Court "upon which RAC might justifiably have relied." Id. The Eighth Circuit ultimately concluded:

> In short, Miller did not change existing law -- it simply stated a reasonable and correct interpretation of the law which differs from the erroneous view RAC had chosen to follow.

Id.

RAC's petition for rehearing and suggestion for rehearing en banc were denied. App. at 43.

REASONS FOR DENYING THE WRIT

The premise of RAC's petition is that no person could reasonably have foreseen that RAC's rental purchase agreements were subject to and in violation of Minnesota's usury statutes. The facts of record clearly show that not only was the Minnesota Supreme Court's interpretation of Minnesota statutory law foreseeable, it was feared. Based on its review of the state statutes, the Eighth Circuit concluded that the Minnesota Supreme Court "stated a reasonable and correct interpretation of [Minnesota] law which differs from the erroneous view RAC had chosen to follow." Fogie, 95 F.3d at 651, App. at 13.

This case presents no federal issues meriting this Court's review. The Eighth Circuit fully considered and correctly analyzed and decided the constitutional issues presented in accord with the decisions of this Court. The Eighth Circuit's decision is not in conflict with decisions of any state court, other circuit courts of appeal or this Court. Its decision presents no radical departure in the law. Petitioners are merely dissatisfied with the decisions of the Minnesota Supreme Court and the Eighth Circuit Court of Appeals.

I. THE EIGHTH CIRCUIT ASSUMED THAT THIS COURT'S RULING IN BOUIE APPLIED TO THIS CIVIL CASE BUT CONCLUDED THAT THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF MINNESOTA LAW WAS NOT "UNEXPECTED OR INDEFENSIBLE."

After this Court's decisions in Marks v. United States, 430 U.S. 188 (1977) and Bouie v. City of Columbia, 378 U.S. 347 (1964), the Due Process Clause of the Fourteenth Amendment now places judges under the same basic constraint as the Ex Post Facto Clause does for legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it may not be given retroactive effect. Bouie, 378 U.S. at 354.

This case does not involve criminal statutes, but civil consumer protection statutes. It has always been Plaintiff Class' position that Marks and Bouie have no application to this case for the same reason that the Ex Post Facto Clause, which only applies to criminal statutes, does not apply to civil statutes. Collins v. Youngblood, 497 U.S. 37, 41 (1990). For that reason alone, review should be denied.

In seeking certiorari, RAC glosses over the fact that over Plaintiff Class' objection, the Eighth Circuit did apply the holding of Bouie v. City of Columbia, 378 U.S. 347 (1964) to this civil consumer protection case. The Eighth Circuit's decision rests not on a conclusion that this Court's holding in Bouie is not applicable to a civil case but on its analysis that the Minnesota Supreme Court's judicial construction and interpretation in Miller was not "unexpected or indefensible" utilizing the Bouie analysis. The Eighth Circuit specifically stated:

> The judicial construction in Miller is not "unexpected or indefensible by reference to" the statutory framework already in place. On the contrary, the judicial construction of those statutes is reasonable and foreseeable, gives full meaning to the statutory language, operates in the manner clearly intended by the legislature, and furthers the consumer protection objectives of the statutes.

Fogie, 95 F. 3d at 651, App. at 13.

The issue, as framed by RAC, simply does not exist for this Court's review given the Eighth Circuit's apparent assumption that Bouie applies to a civil case. This case instead rests on its unique facts. Petitioners' argument is really nothing more than dissatisfaction with the Eighth Circuit's decision which is based on its reviw of Minnesota's unique statutory law. There is no federal question meriting review.

In reality what RAC really wishes this Court to review is the Eighth Circuit's determination that the Minnesota Supreme Court's interpretation of Minnesota law in Miller was reasonable and foreseeable. In stark contrast to the petitioners in Bouie, RAC certainly was not lulled "into a false sense of security, giving [it] no reason even to suspect" that its rent-to-own contracts were usurious. Bouie, 378 U.S. at 352. RAC's basic contention that no reasonable person would have known that its rental purchase agreements were subject to Minnesota's usury laws is absolute nonsense. To the contrary, RAC knowingly took the risk that the Minnesota Supreme Court would construe the statutes as it did. It should be noted that even after the Minnesota Supreme Court's pronouncements, RAC refused to change its way of doing

business and continued to operate in clear violation of Minnesota law.[6]

As the Eighth Circuit concluded, a simple reading of the statutes reveals that it is RAC's position that is indefensible and unjustified. The Eighth Circuit's decision that the Minnesota Supreme Court's rulings in Miller were clearly foreseen and defensible by reference to the statutory framework in place is in complete accord with Minnesota law and the record in this case.

The usury statute, the CCSA and the RPAA were enacted before RAC entered into its contractual agreements with the Plaintiff Class. Since 1981, terminable leases (such as RAC's rent-to-own transactions) have been defined by Minnesota CCSA as a credit sale. As such, they are subject to Minnesota's usury statute. Clearly, RAC could expect and foresee (and in fact its counsel did so warn) that given Minnesota CCSA's broad definition of a "consumer sale" to include terminable leases, its "sales" were usurious. In enacting the RPAA, the Minnesota Legislature considered and specifically rejected a proposal to exempt rent-to-own transactions from the CCSA and therefore the usury statute. The Minnesota Legislature long concluded that such transactions were, in substance, credit sales and must be treated as such. Miller was not only a foreseeable interpretation of this legislation, it was, in fact, foreseen. The Minnesota Supreme Court's interpretation of the statutes in issue was in complete accord with their plain language, had every support in the legislative history and was in accord with Minnesota law.

---

[6] The Minnesota Supreme Court issued its decision in June 1994. Until at least September 1996, RAC continued to operate its business using the same form rental purchase agreement. RAC continues to do business in Minnesota to this day.

As the Eighth Circuit also noted, Miller did not overrule any prior contrary ruling of the Minnesota Supreme Court on which RAC might justifiably have relied. Fogie, 95 F.3d at 651, App. at 13. Bouie only applies to unpredictable shifts in the law, not to the resolution of any uncertainty that marks an evolving legal system. See United States v. Donelly's Estate, 397 U.S. 286, 295 (1970) (generally, decisions construing statutes given full retroactive effect, except in a rare case where a court overrules its own construction of a statute); United States v. Burnom, 27 F.3d 283, 284 (7th Cir. 1994). In contrast to the situation in Bouie, Miller is not a judicial repudiation of any prior controlling, narrow construction of a statute.

RAC continues to misconstrue Miller by claiming that in Miller the Minnesota Supreme Court judicially eliminated essential substantive elements of the Minnesota usury statute.[7] Contrary to RAC's running protestation against the Minnesota Supreme Court's decisions, the Minnesota Supreme Court did not eliminate any common law requirements of usury but concluded they were satisfied as a matter of law. Miller, 518 N.W.2d at 549-50, App. at 55-57. Miller is entirely consistent with its past decisions, as the Minnesota Supreme Court itself noted in Miller:

> There is no shift or device on the part of the lender to evade the [usury] law under or behind which the law will not look to ascertain the real nature and object of the transaction. Adjustment Service Bureau, Inc. v. Buelow, 196 Minn. 563, 567, 265 N.W. 659, 661 (1936).

Id. at 549, App. at 56-57.

---

[7] Colortyme [DEF] raised the same contentions, unsuccessfully, in its Petition for Clarification to the Minnesota Supreme Court. C.A.R.A. at 198. The Minnesota Supreme Court specifically rejected Colortyme's application for prospective application of its decision. C.A.R.A. at 245.

Due process concerns certainly are not implicated where, as here, the statutory construction is clearly in accord with the terms of the statutes and did not upset settled case law.

II. THE EIGHTH CIRCUIT'S REJECTION OF RAC'S VOID FOR VAGUENESS ARGUMENT IS IN FULL ACCORD WITH DECISIONS OF THIS COURT.

In making its "void for vagueness" argument, RAC ignores that a state's supreme court's interpretation of a state statute does not constitute an impairment of a constitutional right unless "such constitutional impairment would have resulted if the meaning had been written into the statute by the legislature itself." Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 361 (1932); Wainright v. Stone, 414 U.S. 21, 22-23 (1973) (for the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation court must take the statute as though it read precisely as the highest court of the state has interpreted it). RAC never argued to the district court that the Minnesota Legislature could not constitutionally mandate what the Miller and Fogie decisions hold. Therefore, as a matter of law, the state court's interpretation of these statutes cannot somehow render the statutes unconstitutionally vague.

As with its due process contention, RAC contends that the Minnesota Supreme Court's interpretation of Minnesota law is void for vagueness because it had no notice whatsoever that its rental purchase agreements were governed by Minnesota's usury laws. The Eighth Circuit, in accord with the standards enunciated by this Court in Grayned and Village of Hoffman Estates, rejected RAC's argument. Fogie, 95 F.3d at 650, App. at 10. RAC's argument is nothing more than a running protestation against the Minnesota Supreme Court's decision and does not present an issue of federal law meriting review.

This Court in Village of Hoffman recognized that economic regulation legislation is subject to a less strict vagueness test because businesses can be expected to consult relevant legislation in advance of action. 455 US. at 498. The Eighth Circuit's decision is in accord with that decision. All statutes in issue are economic regulations and regulate the conduct of business enterprises. The statutes do not threaten to inhibit the exercise of constitutionally protected rights. Fogie, 95 F.3d at 650, App. at 10.

In seeking review, RAC conveniently ignores that there was no damage issue before the Eighth Circuit for resolution. RAC's appeal is from an interlocutory order granting injunctive relief. In any event, Minnesota's usury statute certainly does not impose an uncertain, discretionary civil "penalty." Rather it explicitly specifies the civil "remedies" available to a victim of usury -- i.e. forfeiture of any interest paid on the contract and entitlement to have the contract declared void. In contrast to the situation involving a jury's discretionary award of punitive damages addressed by this Court in BMW of North America, Inc. v. Gore, __ U.S. __, 116 S.Ct. 1589 (1996), since 1877 Minnesota's usury statute has clearly and precisely stated the specific civil remedies to be granted a victim of usury. Barton v. Moore, __ N.W.2d __ (1997 WL 58699) (Minn. 1997).

CONCLUSION

Respondents Plaintiff Class respectfully request that the Petition for Writ of Certiorari be denied.

LOMMEN, NELSON, COLE
& STAGEBERG, P.A.
Phillip A. Cole
Counsel of Record
Kay Nord Hunt
1800 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 339-8131

LEGAL AID SOCIETY OF MINNEAPOLIS
David L. Ramp
2507 Fremont Avenue North
Minneapolis, MN 55411
(612) 588-2099

MANSFIELD & TANICK, P.A.
Seymour J. Mansfield
1560 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 339-4295

Attorneys for Respondents

Dated: March 5, 1997

INDEX TO APPENDIX

Excerpt from Transcript of Hearings on S.F. No. 1499 Before the Minnesota Senate, Comm. of the Whole (March 21, 1990) A-1

Excerpt from 1983 Rent-A-Center, Inc. 1983 Prospectus (1983) A-10

Excerpt from Association of Progressive Rental Organizations, Legal Information Packet (1981) A-14

Excerpt from Rent-A-Center, Inc., Annual Report, Form 10-K for fiscal year ended 7/31/87 ..... A-18

Excerpt from To Amend the Consumer Credit Protection Act with Respect to Consumer Leases and Rental-Purchase Agreements: Hearings on S.1152 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 98th Cong., 1st Sess. (July 19, 1983) (testimony of J. Samuel Choate, Jr., counsel to APRO) A-23

Excerpt from correspondence dated August 12, 1983 from Sheldon L. Schreiberg to The Honorable Paula Hawkins A-27

Correspondence dated October 26, 1984 from James D. Oliver to Ken Wagnon A-30

MINNESOTA SENATE, COMMITTEE OF THE WHOLE
TRANSCRIPT OF SENATE COMMITTEE HEARING
MARCH 21, 1990

Chair: The next item on the agenda will be Senate File - it's number 62 on the agenda, Mr. - Senate File No. 1499. Senator Dahl.

• • •

Chair: Senator Reichgott on Amendment A-17.

Reichgott: Thank you, Mr. Chairman and Members. We had a great deal of discussion on this bill in Judiciary, and the issue there really was whether or not these transactions - these rent-to-own transactions should be covered under - as a credit sale. Should they be a credit sale and have the protections of the interest rate consumer protection in our law, or are they something else that should be exempted out from the credit sales. My amendment would delete Section 15 of the bill which is the language that, in my opinion agnate in the opinion of many others, is what is at issue here. Section 15 is the language that is and now that - and the issue whether or not this would be a credit sale. This is the language that would make it a credit sale and therefore mean that all of those protections, consumer protections, would attach. Unfortunately, what Senator Dahl's bill is doing is deleting that language, and so, under Senator Dahl's bill, if you don't adopt my amendment, you would not have any way, shape or form to call this a credit sale any longer. And so you would have deregulation. You would have no consumer

protection; you would have no interest cap; you would have nothing to protect these consumers. Now, I believe this is a sale. I believe it's as much a sale as any other kind of installment contract. I mean, you don't go into these rent-to-own places and rent the kinds of things that they have without having some sort of intent to own. There are places that rent out, if you can believe this, wedding rings - bridal sets. Now, I don't know about you, but I sure hope that no one in this - this room has gone in and wanted to rent a wedding ring set. I would think most of you would intend to buy a wedding ring set. Now, that means, I hope, that this is a sale. If it is a sale, then let's treat it as a sale. Let's call it a sale, and let's keep the law as it is. Under Senator Dahl's bill we're taking that out, and we're saying no, this isn't a sale. Now, the reason that I've got this amendment, really, is two-fold. One, I believe it's a sale, but secondly, more importantly, this issue - this very issue is currently being litigated in Federal District Court. Judge Magnuson heard the arguments on this bill - on this litigation - on this statute, this very statute, last Friday. Now I don't think it's good public policy for the Legislature to be stepping in now, in the middle of a court case, on the very issue that's before us, and making the policy decision before the Court does. And that is exactly what Senator Dahl's bill would do. And let's just carry that through a little bit. Let's just think, well, we've got a case there, and let's say the Court says, "Well, folks, Legal Aid, you're right. This is a credit sale." Let's say the Court says that. We have basically subverted the Court. We've said, "Well, you can go ahead and

say that Court, that it's a credit sale, but we've removed it right out of the statute so it doesn't make one bit of difference any more for people who want to rent in the future. They won't have any remedy." In other words, what we've said here - even if the court finds it's a credit sale, we've just said, "No, it's not." Well, let the court make the decision. We shouldn't make that decision. Let them make the decision. And then, if they say it is a credit sale, fine, everything's fine. If they say it's not a credit sale, we can come back next year and fix that. But, meanwhile, there's no reason to delete this language from the statute. Don't take away the decision from the court. Let's not subvert the court. That's not our job. let them make their decision and we react to it.

Chair: Any further discussion?

Dahl: Mr. Chairman.

Chair: Senator Dahl.

Dahl: Mr. Chairman. First of all, in relation to the assertion by Senator Reichgott that this subverts the court case, the court case relates to consumer transactions that took place from 1981 to the present. It would have no impact whatsoever on any of those consumer transactions, except that it would provide some substantial consumer protection in the form of reinstatement rights and notice and those sorts of things which currently are not the practice or provided in law. So it would provide some consumer protections, but in terms of damages, they wouldn't have any impact.

Those are matters that have already taken place and this would only have impact in the future. The other thing I would - I just have to comment on is Senator Reichgott said that there's no consumer protection in this bill. Well, in fact, in Commerce Committee, the Attorney General's office stood before the Committee and said that they thought this was good, solid consumer protection. The only issue they had with the bill was the price issue. And that same Committee, and also in Judiciary Committee, Senator Spear asked Legal Aid how they felt about the bill. And I think their comment was that they felt it was a good bill. They were concerned about the price issue, but by and large, they felt that there was solid consumer protection in the bill. And I do invite the Members to look through the bill again. There's very solid consumer protection that's included in this bill. In terms of the issue of sale versus a lease, I became convinced after very substantial discussions that these, in fact, were leases and not sales. For example, if you lease this property from week to week or form month to month, at the end of the lease term - let's say at the end of a monthly lease term, if you decide you don't want the property any more, you can give the property back and you have no further obligation - none whatsoever. Now that's not the case with a consumer credit sale. If you buy and take property, let's say, from Best Buy company or from Sears or Wards or from Dayton's and you make six month's worth of payments, and then you don't want the property anymore. If you give the property back, that may be all well and good, but you're still going to have additional responsibilities

under that purchase to pay for the difference between what they could sell the property for and the amount that you contracted for when you undertook that debt. There is no debt in these transactions. If you go and purchase a piece of property from Dayton's and then they want to sell that piece of paper, that debt instrument, they can go to a bank and that bank will buy that because there's an ongoing obligation to make payments. That's not the case with these transactions If you sign a lease and then you decide that you don't want the property any more, there's nothing there that at a bank will buy. There's no debt. Hence, I would argue, and it certainly convinced me, there's really no sale. It's a lease transaction. So, Mr. Chairman, Members, there is good solid consumer protection in the bill. When it became clear to me that Legal Aid and the industry would never agree on the sale versus a lease, I said, "Look, let's look at every single consumer protection that applies to a consumer credit sale, and then let's make it apply here." And, in fact, we did that, and not only did we do that, but this went beyond that. There are protections here that aren't available for any consumer credit in the nation, or consumer credit sale in the nation, including the Fair Debt Collection Practices Act, which has not been passed by any jurisdiction in the nation. So I think we've done our job. I don't believe that this amendment - not only does it not add anything, but it would probably make the bill, in my opinion, unworkable. And I would have to debate as to whether I would progress the bill if the amendment went on.

Chair: Any further discussion on Senator Reichgott's Amendment A-17? Senator Kroening.

Kroening: Mr. Chairman, Senator Dahl. This is the right-to-own stuff. Right-to-own, it isn't right-to-lease. How do you say it's a lease when they want to own it? It's a sale. In fact, if you look at this clever sheet here, they've got "rent" on there. The next one is "rent-to-own," and then they say "rent-by-phone," and then they say "own it quicker." This isn't' a lease operation. It didn't say here "rent and return." Tell me where it says that. It doesn't say it, so whatever your argument is, when someone goes to this center, they're renting-to-own. Thank you.

Chair: Any further discussions? Senator Laidig.

Laidig: Mr. Chairman. The reason that we need to adopt the Reichgott Amendment - the only reason we had a fifteen minute explanation of all the protections and the guarantees and the consumer protection, the only reason we had that explanation is 'cause the industry wants to write themselves out of the law. Look on page 14. In 1981, this Legislature wrote this language to bring this industry under control. You know how they got out of it? If you're looking at the bill, on page 14, look on lines 21 and 22. Three conditions had to be met. All three had to be met. One of those conditions was that, if for no other or a nominal consideration upon full compliance. Do you know what the industry did? They went from an 18 month program to a 16 month program with a 2 month balloon, and they're arguing that's not a

nominal consideration. In 1981, we closed the loophole. We wrote these conditions. And the industry response is to go out - to go from an 18 month to a 16 month, a 2 month balloon, and now they're in court, in Federal Court, saying that's not a nominal consideration. Therefore we don't fall under the law that was written to apply to us. And the reason Senator Dahl gave us a fifteen minute explanation of all the protection that the industry wants is because they want out from the law that [was] written to include them. So, let's adopt the Reichgott Amendment. And, Senator Dahl, most people, as I understand it, rent-to-own. For vacuum cleaners, I think it's like 90%. For furniture, I don't know how high it is, but most people go in to rent-to-own. That's a consumer sale, and if nothing else, take a look at the handout on the Rent-A-Rock. Why are so many aggressive rental dealers embracing jewelry rent-to-own? Profits. Greed, with a capital "G." Adopt the Reichgott Amendment. Bring this industry under the control that [it] was meant to come under in 1981.

Chair: Any further discussion? Senator Reichgott.

Reichgott: Mr. President, one clarification. My amendment does not take away any of the consumer protections. It leaves in Sections 1 to 14 which are the consumer protections. The reason that Senator Dahl says this bill will be unworkable if my amendment is adopted is because the industry won't want to pass just consumer protection unless they're exempted out of the credit sale act. That's why it's unworkable. Now, with my

amendment, you'll have all the consumer protections there and we'll let the courts decide the issue of the credit sale. And, as one last note, Mr. Chairman, I thank Senator Ramstad for sending me a note that apparently they have talked with the Rent-A-Rock people and I just wanted you all to know that they have weekly rates on wedding rings, so anyone who would like to go on in and get your weekly rate, go ahead.

Ramstad: Mr. Chairman.

Chair: Any further discussion? Senator Ramstad.

Ramstad: Mr. Chairman, just to corroborate what Senator Reichgott said, we just had Rent-A-Rock live, on the air - on the telephone here, and they have discontinued their daily rentals for diamond wedding rings, but they do have the week-to-week or month-to-month.

Chair: Any further discussion?

Dahl: Mr. Chairman.

Chair: Senator. Any further discussion necessary? Senator Dahl.

Dahl: Mr. Chairman. I would just comment that, you know, sometimes these issues are more complicated than they seem. The state of Pennsylvania really made an effort to define these transactions, these rent-to-own transactions, as a credit sale so what the rent-to-own dealers did in Pennsylvania is they just eliminated the rent-to-

own. In Pennsylvania now, you rent-to-rent. You rent forever, and I don't know that that's necessarily a service to the people that they were trying to help. So, you know, I think the bill without the amendment provides very substantial consumer protection and has very, I think, appropriate provisions for the Commissioner to set the total cash price by rule, and I would just hope that you would leave the bill in good shape.

Chair: We have before us, then, Senator Reichgott's Amendment A-17 to Senate File 1499. All those who feel this motion should prevail say "aye."

Committee: Aye

Chair: Opposed? The Chair is in doubt.

Committee: (Laughter)

Chair: The Chair says that the motion passes. We have before us, then, Senate File 1499 as amended. Any further discussions? Hearing on all those who feel that Senate File 1499 should prevail as amended, say "aye."

Committee: Aye.

Chair: Opposed the same. Motion is carried.

1,425,000 Shares

Rent-A-Center, Inc.

Common Stock
(par value $1 per share)

Of the 1,425,000 shares of Common Stock offered hereby, 625,000 shares are being sold by the Company and 800,000 shares are being sold by the Selling Stockholders named under "Principal and Selling Stockholders." The Company will not receive any of the proceeds from the sale of the shares by the Selling Stockholders.

It is estimated that the initial offering price will be between $15.00 and $17.00 per share. Prior to this offering, there has been no established trading market for the Common Stock. See "Underwriting" for the factors to be considered in determining the initial public offering price.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public	Underwriting Discount	Proceeds to Company (1)	Proceeds to Selling Stockholders (1)
Per Share	$	$	$	$
Total	$	$	$	$

(1) Before deducting estimated expenses of $ payable by the Company and $ payable by the Selling Stockholders.

The shares of Common Stock are offered by the several Underwriters named herein, subject to receipt and acceptance by them and their right to reject any order in whole or in part. It is expected that delivery of the shares will be made on or about , 1983.

Kidder, Peabody & Co.
Incorporated

The date of this Prospectus is , 1983

Regulation

Every state in which the Company does business has laws governing consumer credit sales. These laws typically require disclosure to customers of interest rates and finance charges and impose limitations on the rate of interest that may be charged. A rental agreement or lease generally is considered a credit sale only if the renter or lessee contracts to pay rentals in an amount equal to or in excess of the purchase price of the rented property and has an option to purchase the property at the end of the rental term for nominal or no additional consideration. The Company does not believe credit sales laws apply to its business because its rental agreements are terminable at any time by its customers without further obligation, and because its purchase option price should be deemed more than nominal, although the amount that may be considered "nominal" is not clearly defined in such laws. Some courts, however, have held that a terminable rental agreement may be considered a credit sale, depending upon the facts and circumstances of the case, including, in particular, facts showing that the parties intended the agreement to be a credit sale notwithstanding written terms of the rental agreement to the contrary. In addition, some courts have applied the provisions of the Uniform Commercial Code to rental agreements. Such provisions include certain default procedures and a prohibition against unconscionable contracts.

If these laws were found to be applicable to the Company's rental agreements, the rental payments made to the Company may not come within the applicable state interest rate and finance charge limitations. Calculation of the Company's compliance with such limitations would require that various assumptions be made with respect to, among other things, the portion of rental payments that should be considered principal and the term of the agreement. The

penalties for violating such statutes vary from state to state, but may include a forfeiture of all amounts found to be interest or finance charges and, in some instances, forfeiture of the right to collect any payments of principal or interest. In addition, separate penalties may be imposed under many consumer credit sales laws for failing to give required disclosure of credit terms, even if the rates charged are lawful.



Association of
Progressive Rental Organizations

LEGAL INFORMATION PACKET

© 1981 ALL RIGHTS RESERVED

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. Truth-In-Lending	3
A. The Statute and the Regulation	3
B. Federal Reserve Opinions	10
C. The Case Law	14
II. Consumer Leasing Act	20
III. Unconscionability	26
IV. Deceptive Trade Practice Legislation	35
V. Usury	49
VI. Perfection, Repossession and Bankruptcy	52
A. Perfection	52
B. Repossession	54
C. Bankruptcy	61
VII. Warranty Problems	64
A. Implied Warranties	64
B. Magnuson-Moss	66
APPENDIX	
Selected Federal Reserve Board Unofficial Staff Opinions	A1
Ford Motor Credit Co. v. Milhollin	A6
Dodson v. Remco Enterprises, Inc.	A23
Smith v. ABC Rental Systems of New Orleans, Inc.	A29
Selected Correspondence with the Fed Regarding Amendment to Regulation Z	A33

V

Usury

One final point should be made regarding "price unconscionability." Could a consumer attorney argue successfully that a terminable lease is a disguised installment sale for usury purposes? If a court were to treat such a lease as a disguised installment sale, the excess of the total rental payments over the estimated cash purchase price would be considered as finance charge subject to any applicable installment sales legislation. This could be disastrous.

Members should have no trouble with this theory. First, state installment sales legislation will typically exclude from the definition of "consumer credit sale" a lease which can be terminated at any time by the lessee. For example, §1.301(12) of the Uniform Consumer Credit Code (in effect in a number of midwestern states) requires that there be a "sale" involving a "debt" payable in installments or with a finance charge. When there is no "debt" for the aggregate rental payments, there is no "consumer credit sale" within the meaning of such legislation. In fact, §1.301(14) of the U3C expressly distinguishes a "consumer lease" from a "consumer credit sale", defining a "consumer lease" as a "lease" of consumer goods for a term exceeding four months. This definition is parallel to that found in the Federal Consumer Leasing Act, discussed above. Therefore, the Fed staff opinions would be persuasive here also. Thus, the terminable transaction is neither a "consumer credit sale" subject to the rate limits of the U3C, nor a "consumer lease" subject to other requirements of that statute. Because of the right to cancel, the transaction is simply not covered by the typical installment sales or lease legislation at the state level. Second, the classic definition of usury involves, as a key element, an obligation to repay a debt in full. See 45 Am. Jr. 2d, Interest and Usury, at §117. It

covers loans of money but not loans of tangible personal property. Also see 45 Am. Jr. 2d, Interest and Usury, at §121; Title Guaranty & S. Co. v. Klein, 178 F. 689 (3d Cir. 1909). Thus, the convenience leases should escape the usury challenge even though they include a "rent to own" option. Third, all of the recent judicial decisions which find usury in an installment sale setting involve situations where the lessee was obligated to pay the full cash price plus a hidden finance charge. See, e.g., Bell v. Itek Leasing Corp., 555 SW2d 1 (Ark. 1977); McGalliard v. Liberty Leasing Co., 534 P.2d 528 (Alaska 1975); National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977). In fact, most of these cases come up when the lessor sues the lessee for unpaid rents. In short, the option to terminate at the end of any weekly or monthly rental period should insulate the industry from attack based upon a usury theory. Nonetheless, counsel for leasing companies in various states should beware of special state statutes which may broaden the definition of a "consumer sale" to include terminable leases and thus raise usury questions. See the discussion concerning default and repossession in the next section.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Fiscal Year Ended July 31, 1987
Commission File No. 0-12738

RENT-A CENTER, INC.
(Exact name of registrant as specified in its charter)

Delaware	48-0959188
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
9920 East Harry, Wichita, Kansas	67202
(Address of Principal Executive Offices)	(Zip Code)

Registrant's telephone number,
including area code: (316) 689-4100

Securities registered pursuant to Section 12(b)
of the Act: None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock	Convertible Subordinated
Par Value $1 per share	Debentures due 2012

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12

months (or such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.
Yes _X_ No _____

Aggregate market value of the voting stock of Registrant held by nonaffiliates of the Registrant as of October 13, 1987: $0.

Indicate the number of shares outstanding at each of the issuer's classes of Common Stock, as of the latest practicable date. Common Stock, $1 par value per share, 1,000 shares, as of October 13, 1987.

DOCUMENTS INCORPORATED BY REFERENCE

Listed below is each document incorporated by reference in this report and the Part of this Form 10-K into which it is incorporated:

None

Regulation

The Company's rental transactions are regulated by state law in Alabama, Arkansas, Georgia, Indiana, Iowa, Massachusetts, Michigan, New York, South Carolina, Tennessee, and Texas. These laws distinguish "rental-purchase" agreements from consumer credit sales and generally require that certain disclosures be made to customers relating to price and ownership options prior to execution of the rental agreement. These laws, all of which have become effective within the past four years, provide a degree of clarity and stability in the regulatory environment and the Company supports efforts to promote the enactment of similar laws in other states.

Two states (North Carolina and Pennsylvania) have amended their credit sales laws expressly to include terminable rental agreements as credit sales when they contain a nominal purchase price option, so as to impose mandatory disclosure of credit terms and limitations on rates that may be charged. Although the Company takes the position such laws should not apply to its rental agreements because it believes its purchase option prices are more than "nominal", it has amended the rental agreements used in Pennsylvania to include credit sales disclosures.

In the absence of other governing statutes, some courts have held that rental agreements with purchase options should be governed by consumer credit sales laws and the Uniform Commercial Code ("UCC"). State consumer credit sales laws generally require written disclosure to customers of interest rates and finance charges and limit the rate or amount of such charges. UCC provisions include prescribed default procedures and a prohibition against unconscionable agreements. A rental agreement or lease generally is

considered a credit sale, subject to consumer credit sales laws and the UCC, if the renter contracts to pay rent in an amount equal to or in excess of the purchase price of the rented property and has an option to purchase the property at the end of the rental term for nominal or no additional consideration. The Company believes that such laws do not apply to its business because its rental agreements are terminable at any time by its customers without further obligation and because the purchase option price stated in its agreements should be deemed more than "nominal".

If adopted by legislation or applied by judicial interpretation to rental transactions under the System, credit sales laws regulating rates and charges in such transactions could have an adverse effect on the operations and profitability of a Franchisee under the System, which effect might be material, depending on the particular law involved. Calculation of the compliance under the System with such statutes vary from state to state, but may include a forfeiture of all amounts found to be interest or finance charges, and in some instances, forfeiture of the right to collect any payments of principal or interest. In addition, separate penalties may be imposed under many consumer credit sales laws for failing to give required disclosure of credit terms, even if the rates charged are lawful.

The Company supports the adoption of a federal law regulating rental-purchase agreements. A bill has been introduced in the 1987 session of U.S. Congress which would recognize rental-purchase agreements as a separate category of consumer transaction; would impose certain regulations on rental purchase advertising; and would require disclosure to customers of information relating to price and ownership option. The Company already voluntarily provides written disclosure of such information to its customers. The Company

believes the adoption of a federal law governing rental-purchase agreements would encourage fair and uniform regulation nationwide, and decrease the likelihood of inconsistent judicial interpretation of the laws governing such agreements.

The Company's business is further affected by various other state laws, including those affecting collection and repossession practices.

CONSUMER CREDIT PROTECTION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON CONSUMER AFFAIRS
OF THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN
AFFAIRS
UNITED STATES SENATE
NINETY-EIGHTH CONGRESS
FIRST SESSION
ON
S. 1152

TO AMEND THE CONSUMER CREDIT PROTECTION ACT WITH RESPECT TO CONSUMER LEASES AND RENTAL-PURCHASE AGREEMENTS

JULY 19, 1983

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

U.S. GOVERNMENT PRINTING OFFICE
23-925 O WASHINGTON: 1983

Testimony of

J. Samuel Choate, Jr., Esq.

My name is J. Samuel Choate, Jr. and I am a partner in the Georgia law firm of Surrett, Choate and Walker. I am pleased to have the opportunity to appear before the Subcommittee on behalf of the Association of Progressive Rental Organizations, which represents companies that rent televisions and other home appliances under short-term leases with ownership options. (These leases are referred to as rental/purchase agreements in S. 1152.) Accompanying me is Bill Ogle, who owns and operates some 20 rental outlets in Florida.

Because short-term leases are not regulated under federal law, a confusing and inefficient patchwork of state legislation and judicial decisions has begun to emerge. We believe that federal legislation regulating such short-term leases is necessary in order to obtain guidelines that provide for adequate, reasonable and, most importantly to the rental industry, uniform disclosures.

My testimony today will focus first on a description of the industry and the services it provides, and then on the status of short-term leases under federal and state law. Finally, I will discuss the industry's reasons for supporting passage, with minor modifications, of S. 1152.

• • •

Relation to State Law

One of the principal objectives of federal legislation should be to clarify the present confused status under state law of short-term leases with ownership options. Section 131 of S. 1152 would do little to affect that situation because only inconsistent state laws would be preempted by the federal legislation, with inconsistency being defined more narrowly

than in any previous similar federal law. The essence of the problem is efforts by state legislatures or courts to characterize the short-term consumer lease as something it is not, by labeling it a purchase or a credit sale.

The result for the industry is that, under state law, disclosure and other requirements (usury limits, for example) that have been designed to apply to credit sales would become applicable to short-term leases. Most rental dealers would find it both impracticable and uneconomical to comply with such state regulatory requirements. Particularly for dealers located in large metropolitan areas that span state lines, the additional costs and labor needed to prepare the multiple documents and advertising materials necessary to ensure compliance with both federal law and the provisions of differing state laws would be substantial. As a result, many rental dealers would be likely to drop the ownership option from their rental contracts, as has occurred in Pennsylvania, and consumers would lose the opportunity to obtain ownership, at little or no cost, of products they have rented for a period of time and would like to keep.

Federal preemption, by imposing a uniform set of disclosure requirements for the types of leases used by the rental industry, would make it feasible for dealers to continue offering this option.

Congress previously has preempted the ability of the states to characterize transactions as credit sales. Under Section 171(c) of the Truth-in-Lending Act (15 U.S.C. § 1666(j)), state law may not treat the difference between the price charged a cash-paying customer (who often is given a discount for using cash instead of credit), and the price charged a customer paying by credit, as part of the interest rate charged to the credit customer. For example, if a cash customer is able to negotiate a $95.00 price for a $100.00 product, and the retailer sells the product for $100.00 to a credit customer, the states cannot require that the $5.00

difference be quantified as a monthly multiple of an interest rate (e.g., the $5.00 discount multiplied by the 12 months in a year equals $60.00, resulting in an annual percentage rate of 60%). If states were not preempted in this area, merchants would most likely not be able to offer discounts to those paying cash since in many cases they then would be considered to be exceeding state usury limits for credit transactions.

Just as the discount provided a cash-paying customer is not considered a finance charge, the rental payments made under a short-term lease should not be characterized as a credit sale because the consumer is paying for the use and maintenance of an appliance, not purchasing it outright. Because the consumer has only a limited obligation under a short-term lease, it is illogical to characterize the differential between the required lease payments and the cost of the appliance to the dealer (or a comparable retail selling price) as a finance charge. Furthermore, it would be highly misleading to use the typically short lease term as the constant time period by which to multiply such a differential to calculate an annual percentage rate. For these reasons, we suggest that a Subsection (e) be added to § 131, Relation to State Laws, in S. 1152, which follows the format of 15 U.S.C. § 1666(j) and which would read as follows:

> Notwithstanding any other provisions of this title, any transaction pursuant to a consumer lease or other agreement within the definition of a "consumer lease" or "rental purchase agreement", as set forth in §§ 103(a)(5) and (9) of this act, shall not be considered a credit sale or other transaction for credit under the usury laws of any state or under the laws of any state relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element of charges permissible under such laws in connection with the extension or use of credit.

August 12, 1983

The Honorable Paula Hawkins
Chairman
Subcommittee on Consumer Affairs
of the Committee on Banking,
Housing and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Hawkins:

The Association of Progressive Rental Organizations (APRO) appreciates the opportunity to respond to the additional questions you have posed relating to APRO's testimony on S. 1152, which was submitted at the hearing held by the Subcommittee on Consumer Affairs on July 19, 1983.

• • •

Usury Limits - Many states have enacted usury laws limiting the amount of the "finance charge" paid by a consumer, in terms of an annual percentage rate, for the credit obtained to finance the purchase of a product. Lease transactions, if characterized as "credit sales", would become subject to such usury limits. In order to apply usury laws to a lease transaction, for which there is no amount financed or finance charge, it has been suggested that a "finance charge equivalent" be computed by calculating the differential between the "fair market value (FMV) of the product" at the time the initial lease term begins (i.e., the amount financed) and the "aggregate cost to the consumer." For example, the average consumer makes 12 to 16 payments during a lease, but the "finance charge equivalent" would be calculated as if he or she were to make 78 payments. This calculation would

result in a finance charge commonly in excess of state usury limits.

Use of this formula to calculate a "finance charge equivalent" for a lease transaction, however, would produce dramatically different and inequitable results compared to the calculation of a "finance charge" for a credit sale. The rental dealer's costs of providing the short-term leasing service, which are incorporated into a consumer's rental payments, would be considered part of the "finance charge equivalent" under this calculation and thus would be subject to limitation, whereas the retail merchant's costs relating to selling his product are not required to be included in the "finance charge" for a credit sale. Furthermore, this formula assumes that each customer renews his lease for the potential, but not required, maximum number of payments before ownership transfers, which is the number of payments used to calculate the finance charge equivalent. In fact, because most consumers renew their leases for only three to four months and thus do not make the potential maximum payments necessary for ownership, use of the potential maximum payments would result in calculation of an inaccurate finance charge equivalent.

The purpose of the usury law is to control the price of credit to consumers, not to limit the price of a product or service. Thus, usury laws do not attempt to control the price a retail merchant may charge for purchase of a product. However, because of the anomalies that arise in attempting to calculate a finance charge equivalent for lease transactions, the application of usury limits to a lease transaction would have the distorted effect of controlling or limiting the price of the service, i.e., the lease payment. Since the rental dealer would thus be prevented from pricing the weekly or monthly rental payment based on the costs the dealer incurs in doing business, the dealer would be put out of business.

• • •

Sincerely,

s/s

Sheldon L. Schreiberg

Enclosures

cc: Robert C. Zimmer, Esq.
J. Samuel Choate, Jr., Esq.
Edward L. Winn, III, Esq.

bcc: George C. Evans
Charles D. Sims
Thomas Devlin
Barry L. Gambini
Terry Washburn

FOULSTON, SIEFKIN, POWERS & EBERHARDT
Law Offices
A Partnership Including a Professional Association
700 Fourth Financial Center
Broadway at Douglas
Wichita, Kansas 67202
(316) 267-6371

October 26, 1984

Mr. Ken Wagnon
Capital Systems
300 N. Main
Wichita, Kansas 67202

Dear Ken:

I have enclosed a copy of an opinion letter received from Minnesota counsel. The letter came with a rather large stack of enclosures of statutes and cases for my review.

The basic conclusion is that the Rent-A-Center agreement is not a credit sale contract under Minnesota law and can be used without modification. However, I also asked whether there are precautions that can be taken to comply with laws that would apply if the agreement were to be recharacterized as a credit sale by a court's interpretation. If possibe, it is to your advantage to be able to argue that you comply with any laws that might be applied. Because of the extremely low legal interest rate applicable to such agreement in Minnesota (8%), it probably would not be possible to convince a court that the agreement was lawful if it should ever be construed as a credit sale contract. Therefore, I think it is doubtful that any changes in the agreement would be worthwhile.

You will note that they recommend submitting the agreement for an opinion by the attorney general as to compliance with the Minnesota Plain Language Contract Act. I intend to authorize them to do so and do not anticipate any problem in obtaining approval.

I will also review the materials they enclosed and report any additional recommendations within a couple of weeks.

Very truly yours,

s/s

James D. Oliver

OF FOULSTON, SIEFKIN, POWERS & EBERHARDT

JDO/an
Enc.

SUPREME COURT, U.S.
FILED
MAR 17 1997
CLERK

No. 96-1233

In The

Supreme Court of the United States

October Term, 1996

THORN Americas, Inc., (formerly known as Rent-A-Center, Inc.), a Kansas corporation, and THORN EMI North America Holdings, Inc., a Delaware corporation,

Petitioners,

vs.

Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

JANICE M. SYMCHYCH
Counsel Of Record
STEVEN J. WELLS
PETER W. CARTER
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-2600

SHANNON L. SPANGLER
SHOOK, HARDY & BACON L.L.P.
1200 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-6550

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. WHETHER THE RULE ARTICULATED IN *BOUIE* SHOULD BE APPLIED TO THE RADICAL AND UNFORESEEABLE EXPANSION OF A CIVIL STATUTE, PENAL IN NATURE, IS AN IMPORTANT QUESTION SQUARELY PRESENTED HERE..... 1

II. WHETHER A MORE THAN MERELY "TOLERANT" TEST FOR VAGUENESS MUST BE APPLIED WHEN THE SANCTIONS FOR VIOLATION OF THE LAW BEING TESTED ARE PENAL IN NATURE IS ALSO A QUESTION SQUARELY PRESENTED FOR REVIEW BY THIS CASE 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 116 S. Ct. 637 (1996) 3

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) 8

Bouie v. City of Columbia, 378 U.S. 347 (1964) 1

Fogie v. Rent-A-Center, Inc., 518 N.W.2d 544 (Minn. 1994) ..... *passim*

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 6

Lynce v. Mathis, No. 95-7452, 1997 WL 65582 (1997) 5

Miller v. Colortyme, Inc., 504 N.W.2d 258 (Minn. Ct. App. 1993) 7

Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994) ..... *passim*

Rathbun v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1974) 1

United Realty Trust v. Property Dev. & Research Co., 269 N.W.2d 737 (Minn. 1978) 8

Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1987) 4

Walter E. Heller & Co. v. Warner, 163 N.W.2d 573 (Minn. 1968) 2

I. WHETHER THE RULE ARTICULATED IN *BOUIE* SHOULD BE APPLIED TO THE RADICAL AND UNFORESEEABLE EXPANSION OF A CIVIL STATUTE, PENAL IN NATURE, IS AN IMPORTANT QUESTION SQUARELY PRESENTED HERE

Respondents do not take issue with the importance of the due process principles enunciated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964); nor do respondents challenge the importance of a clear determination by this Court that the principles of *Bouie* should be applied when serious penalties are implicated, even if they are civil. Instead, in complete disregard of the actual language of the statutes that governed THORN America's rental-purchase agreements, respondents dwell almost entirely on the supposed "notice" petitioners had of the radical change in the law worked by the *Colortyme/Fogie* decision. As this Court ruled in *Bouie*, however, the determination of whether fair warning existed "must be made on the basis of the statute itself," 378 U.S. at 355 n.5, not on snippets from legislative history, proposed legislation never enacted, or opinions offered years before the most relevant law was passed.

Prior to the *Colortyme/Fogie* decision, the statutes at issue did not give any clue that they would be extended to apply to rent-to-own transactions. Whatever discussions took place in or outside of the legislative halls, the first irreducible fact is that the terms of the strictly construed usury law required, among other elements, (1) that a debt be incurred and, (2) that there be an agreement that the principal shall be repayable absolutely. *See, e.g., Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn.

1974). The second irreducible fact was stated by the Minnesota Supreme Court itself in *Colortyme/Fogie*: "rent-to-own consumers technically do not incur any debt . . . [and] a rent-to-own consumer technically has no absolute obligation to repay a principal amount." Pet. App. at 55. Thus, prior to *Colortyme/Fogie*, absolutely no warning existed that the usury statute, as it then existed, applied to rent-to-own agreements.

The Minnesota Supreme Court's construction of the usury statute when read with the Credit Sales Act was also completely unexpected. After noting that there was "technically" no credit granted, the Minnesota Supreme Court nonetheless gave the term "credit" a "liberal construction" for purposes of the Credit Sales Act, because that act was a "remedial statute." *Id.* at 52-53. That construction was novel. What followed was nothing less than radical: The newly devised, liberal definition of credit was then used to eliminate two of the elements of usury, even though it was well-established law in Minnesota that the usury statute was regarded as "penal in nature," and, as such, its terms were to be given a *strict* construction, not a liberal one. *See, e.g., Walter E. Heller & Co. v. Warner*, 163 N.W.2d 573, 577-78 (Minn. 1968); Pet. at 6. There was no warning, prior to *Colortyme/Fogie*, that a liberal construction would be placed on the term "credit" as used in the Credit Sales Act, which would then be extended to eliminate "by operation of statute" two of the four elements of the strictly construed usury law. No prior decision of the state supreme court warned that this construction might occur, and respondents point to none.

Indeed, the unforeseeablity of the usury statute applying to rent-to-own transactions is highlighted

throughout respondents' brief. Each time respondents state that the rent-to-own agreements constituted a credit sale, they cite to only one case – the *Colortyme/Fogie* decision itself. They cite to only one case because before *Colortyme/Fogie* no Minnesota court had ever construed the rent-to-own agreements as a credit sale. Similarly, attempting to make it appear as if the plain language of the Credit Sales Act had patently included all rent-to-own agreements before *Colortyme/Fogie*, respondents baldly state that all such agreements were "defined by Minnesota statutes as credit sales." Br. in Opp. at 2. Once again, however, their cite to authority is only to the statute as "interpreted" in the *Colortyme/Fogie* decision. *See id.* Prior to *Colortyme/Fogie*, a rent-to-own agreement was only a credit sale covered by the Credit Sales Act if it also involved the actual granting of credit – such as when a rent-to-own customer borrowed money to make his or her payments. Pet. App. at 84. Petitioners had no notice that a court was going to disregard the clear "credit" requirement and then eliminate two of the elements of the strictly construed usury statute.

Respondents' reliance on legislative "history" as notice is legally insufficient under the standard set out in *Bouie*. It is also misleading: the relevant legislative history would be that of the usury statute, but tellingly respondents are silent in that regard.[1] Moreover, even if the

---

[1] Even accurately referenced legislative history would prove little here. As Justice Scalia has observed in a concurring opinion, "the law is what it says: we should content ourselves with reading it rather than psychoanalyzing those who enacted it." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996). Here, as set forth above the statutes are mute as

Court were to consider legislative history, nothing in the legislative history of the Credit Sales Act, from which respondents do selectively quote, even hints that any liberal definition of credit under the Credit Sales Act would be extended to the usury statute, let alone then applied to already completed transactions.

Nor did any prospectus or legal information packet create notice that this radical change in the law was foreseeable. At the time of the prospectus and the legal information packet, Rent-A-Center was not even doing business in Minnesota. Not surprisingly, before Rent-A-Center commenced business in Minnesota, its franchisee's counsel unequivocally opined that the Credit Sales Act *did not* apply to the rent-to-own agreements. Moreover, respondents completely ignore one critical issue: namely, what role the comprehensive Rental-Purchase Agreement Act ("Rental-Purchase Act") enacted in

---

to their application to rent-to-own transactions. In addition, legislative history is simply not reliable. As Judge Kozinski of the United States Court of Appeals for the Ninth Circuit has warned:

> The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great.

Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1987) (en banc) (Kozinski, J, concurring). The fact that certain provisions of a statute were not enacted is unimportant; what is important are the statutes that emerged from the legislative deliberations.

1990 was meant to serve if a 1981 amendment to the Credit Sales Act had already rendered it a nullity. Petitioners' full compliance with the Rental-Purchase Act made the radical change in the law even more shocking.

The state court can, of course, make radical and unforeseeable "interpretations" of state law. It is the federal court's retroactive application of those changes in the law that violated fundamental concepts of due process here. Although the court of appeals acknowledged the existence of *Bouie*, it failed to actually apply *Bouie* to this case; the court of appeals' holding is that the important due process principles underlying *Bouie* do not operate to prevent what happened here. As this Court recently stated, however, "the presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v. Mathis*, No. 95-7452, 1997 WL 65582 at *2 (U.S. Feb. 19, 1997). This Court should take this opportunity to decide that the *Bouie* standard should be applied in a case such as this, where a retroactively applied, unexpected and unforeseeable change in state law, penal in nature, has virtually eliminated an entire industry.

II. WHETHER A MORE THAN MERELY "TOLERANT" TEST FOR VAGUENESS MUST BE APPLIED WHEN THE SANCTIONS FOR VIOLATION OF THE LAW BEING TESTED ARE PENAL IN NATURE IS ALSO A QUESTION SQUARELY PRESENTED FOR REVIEW BY THIS CASE.

Even if, as respondents argue, the principles of *Bouie* were not implicated here because the state supreme court merely "interpreted" the law and did not unexpectedly

change it, then the second question presented by the Petition would come to the fore: Where severe remedies, civil in name but penal in nature, will be the sure result if a law is interpreted to apply, is a merely "tolerant" test for vagueness sufficient to guard against the application of that law without the fair notice required by due process?

Respondents' answer to this question is one of avoidance. Even though petitioners expressly stated in the Petition that "[t]he vagueness at issue is not with the law as it existed following the new 'interpretation' by the state supreme court," Pet. at 23, respondents' primary response is to argue that "the state court's interpretation of these statutes cannot somehow render the statutes unconstitutionally vague." Br. in Opp. at 21.

The real problem here, with which respondents do not deal, is what this Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), recognized as the vagueness problem posed by a statute – or here, a combination of statutes – that is "a trap for the wary as well as the unwary."[2] Here, as was similarly true in *Gentile*, careful study of the possibly relevant statutes – the usury law, the Credit Sales Act, and the Rental-Purchase Act – yielded the conclusion that the usury law did not apply

---

[2] *Gentile*, 501 U.S. at 1051 ("The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary."). Respondents do not even acknowledge *Gentile*, much less distinguish the issue addressed there from the one presented by this case.

to transactions that did not involve the extension of credit, and rental-purchase agreements such as those utilized by petitioners did not involve the required credit. These conclusions of the "wary" were borne out by the Minnesota courts: The Minnesota Supreme Court in *Colortyme/Fogie* itself expressly acknowledged that the transactions at issue did not "technically" involve the extension of credit,[3] and the Minnesota Court of Appeals had previously expressly concluded that the usury laws did not apply to these transactions because they did not involve the extension of credit. *Miller v. Colortyme, Inc.*, 504 N.W.2d 258, 260 (Minn. Ct. App. 1993). What the law "technically" requires is, of course, what the "wary" would look for, and here there was a "safe harbor": if no credit was extended, then the usury law did not apply. It was only after the Minnesota Supreme Court "interpreted" the usury law to apply not just to terminable leases that really did involve credit, but even to transactions that did not "technically" involve credit that both the wary and the unwary found out that what the clear words of the statutes meant "technically" was not what they meant "legally." The economic incentive to be wary thus did not obviate the vagueness problem, and the court of appeals' economic justification for applying a "more tolerant" vagueness test thus was disproved by the record here.

---

[3] *See, e.g.*, Pet. App. at 55 ("We agree . . . that rent-to-own consumers technically do not incur any debt. . . . We also agree . . . that a rent-to-own consumer technically has no absolute obligation to repay a principal amount.").

Respondents also attempt to avoid the impact of the vagueness question by noting that there was nothing uncertain about the nature of the "remedies" that would apply to violations of the usury statute. *See* Br. in Opp. at 22. It was indeed certain that if the usury law applied, draconian remedies, long declared by the state courts themselves to be "penal in nature," *see, e.g., United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 742 (Minn. 1978), would be imposed. The vagueness problem articulated in the Petition and reiterated above, however, lies in divining how a reasonably prudent person was to know those laws would be applied in the first place when, "technically," they did not apply. Indeed, it is because of the certainty of the application of those "penal" remedies that the court of appeals should have recognized that, especially in light of the concerns this Court articulated in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), a *more* strict and *less* tolerant test for vagueness should have been applied. The question of the appropriate standard to use for a vagueness challenge when civil penalties are the certain consequence of a statute's application is thus squarely presented for this Court by this case, and fully merits this Court's review.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JANICE M. SYMCHYCH
Counsel of Record
STEVEN J. WELLS
PETER W. CARTER
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-2600

SHANNON L. SPANGLER
SHOOK, HARDY & BACON L.L.P.
1200 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-6550

March 17, 1997